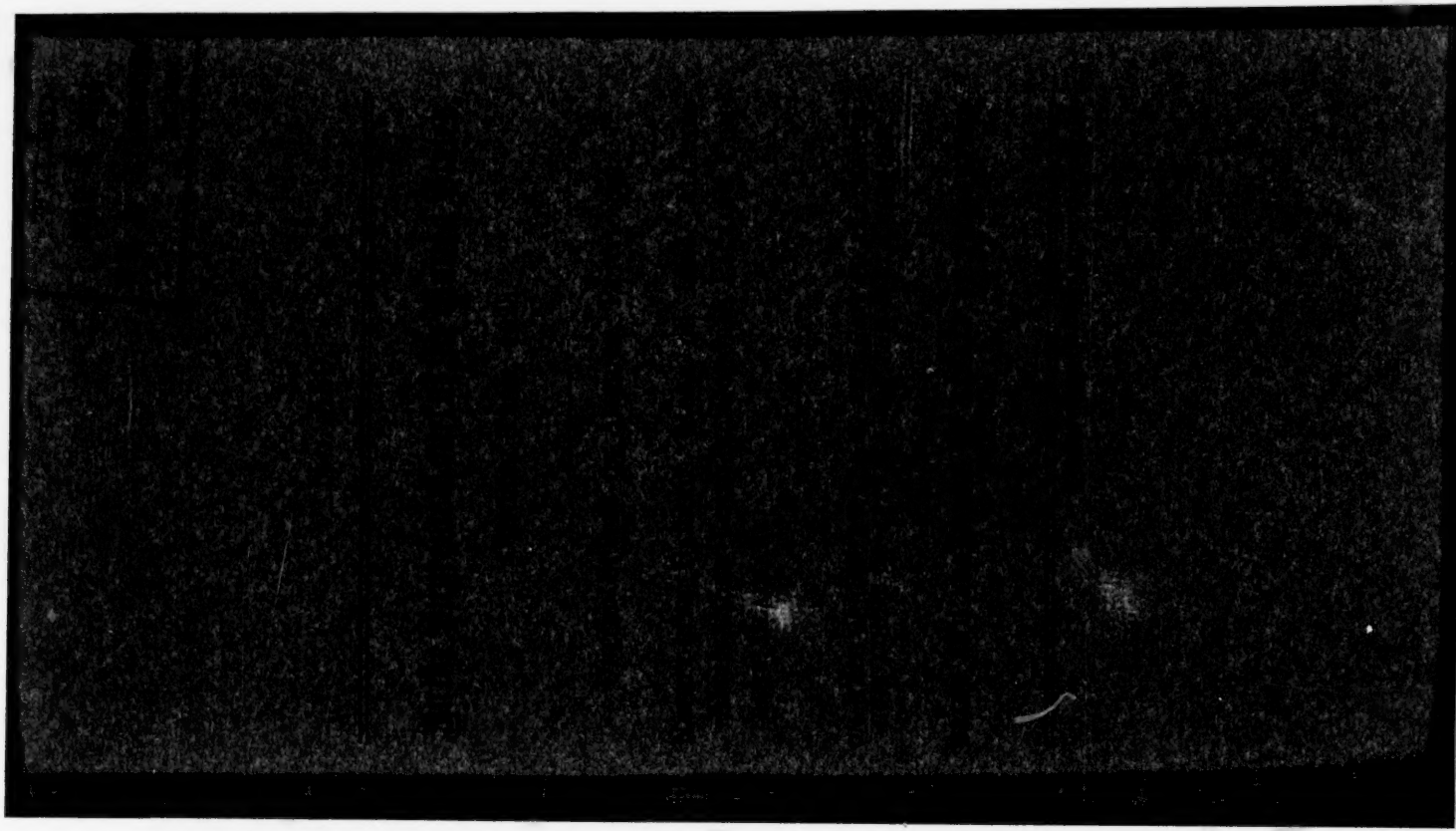


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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, PLAINTIFF IN Error,
v.
NINETY-FIVE BARRELS, MORE OR LESS, Alleged Apple Cider Vinegar, Douglas Packing Company, Claimant, Defendant. } No. 559.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

[All Italics are ours unless otherwise stated.]

STATEMENT OF THE CASE.

The information as amended (R. pp. 1–3) alleges that every barrel of vinegar seized was labeled as follows:

"Douglas Packing Company
Excelsior Brand Apple Cider Vinegar made
from Selected Apples
Reduced to 4 Percentum
Rochester, N. Y.
Guaranteed to comply with all Pure Food Laws
Douglas Packing Company
Rochester, N. Y.";

but that its contents "consist wholly or in part of vinegar made from evaporated or dried apples." And it was therefore alleged that the vinegar was adulterated, because it had been mixed and packed

with, and substituted wholly or in part for another article, and that it had been misbranded, because (1) the statements on the label "are false and misleading and deceive and mislead the purchaser, and (2) because "it is an imitation of and offered for sale under the distinctive name of another article."

The Douglas Company, as claimant, had itself made a party defendant (R. p. 4), and filed an answer in which it denied both the adulteration and misbranding (R. pp. 5, 6). Subsequently, by leave of the court, the company withdrew its answer and filed a demurrer to the information (R. p. 7). This demurrer was overruled (R. p. 10); and the cause was then heard by the court (Judge Westenhaver), without a jury, upon a stipulation of facts (R. pp. 10–13). The court in a well considered opinion (R. pp. 14–20) held that the vinegar was misbranded; but held that the charge of adulteration on the ground that it had been mixed and packed with another substance was not sustained, and did not pass on the question of adulteration on the ground that it had been substituted wholly or in part for another article; and judgment was entered in accordance with the opinion (R. pp. 20–22). On appeal the judgment of the lower court was reversed by the majority of the court of appeals, the opinion being prepared by Judge Donahue, and it not appearing which of the other judges concurred (R. pp. 29–36). After a petition for a rehearing was dismissed an application was made to this court for a writ of certiorari, which was granted (R. p. 40).

THE FACTS.

The finding of the District Court was based upon the stipulated facts supplemented by, or construed in the light of, facts of which the court took judicial knowledge. A condensed statement of the material stipulated facts is as follows:

(1) Material from which vinegar made.

The claimant has been ever since 1906 manufacturing from fresh, sound and mature apples Apple Cider and Apple Cider Vinegar, and from evaporated apples of the same character products which it designates "Apple Cider" and "Apple Cider Vinegar." Fresh apples are used during the apple season, between about September 25 and December 15, and evaporated apples during the remainder of the year. (R. p. 11.)

(2) Process of manufacturing the vinegar in question.

The evaporated apples are dehydrated by the most approved process, a small amount of sulphur being used to prevent rot, fermentation and discoloration, and about 80 per cent of the water being removed. Whether and to what extent other constituents are removed is not wholly beyond controversy.

A quantity of evaporated apples are placed in a receptacle and there is introduced an amount of pure water substantially equivalent to that removed in the evaporating process. A weight of more than a ton (to what quantity of apples is not stated) "is

then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar." The quantity of liquid is about the same as would have been obtained from fresh apples, and it carries a small but harmless quantity of sulphur dioxide, which is later removed during the process of manufacture by barium carbonate, or some other chemical agent. The liquid is then converted into vinegar by passing through the two stages of alcoholic and acetic fermentation in the same way as vinegar is made from the juice of fresh apples (R. 11, 12).

(3) Resultant Product.

"After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples," except it contains a harmless trace of barium; and the vinegar thus obtained "is similar in taste and in composition to the vinegar made from unevaporated apples," except it contains a harmless trace of barium.

It is not claimed that the vinegar thus made from evaporated apples is inferior to that made from fresh apples (R. p. 12).

(4) Commerce in the article.

Since January 1, 1906, claimant has sold its products manufactured from both fresh and evaporated apples as Apple Cider and Apple Cider Vinegar, its vinegar being branded "Excelsior Brand Apple Cider Vinegar made from Selected Apples," or "Sun Bright Brand Apple Cider Vinegar made from Selected Apples." And "for several years prior to the enactment of the Federal Food and Drugs Act and subsequent thereto, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples was sold in various parts of the United States as 'Apple Cider Vinegar' and 'Apple Cider,' respectively, by many manufacturers, including the American Fruit Products Company, of which company Robert Douglas, president of the claimant company, had been production manager. The American Fruit Company operated eleven plants, located in New England, New York and Michigan." (However it is not stipulated what these products were understood to be by the trade or the consumer).

In selling such products as "Apple Cider" and "Apple Cider Vinegar" claimant acted in good faith.

The report of the Census Bureau shows that in 1910 there were in the United States 430 manufacturers of cider and vinegar, and the total value of the product was $2,254,000, and in 1920 there were 720 manufacturers, and the value of the product was $24,671,000 (R. pp. 12, 13).

(5) Attitude of the Department of Agriculture.

The Department of Agriculture has never sanctioned such labeling, and its attitude with reference to the definition of apple cider vinegar is shown in Circulars Nos. 13, 17, 19, and 136 and Food Inspection Decision No. 140, to which reference will hereafter be made (R. p. 13). And it is not questioned "that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name 'apple cider vinegar'" (R. p. 12).

Certain inferences which may be drawn from the stipulated facts will be considered hereafter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT.

As agreed in the stipulation, samples of cider and vinegar made from both fresh and evaporated apples were submitted to the district judge; and he found that, "There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar" (R. p. 15). He also took Judicial notice that—

> Cider is defined by Webster as "the expressed juice of apples." By the word "expressed" is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from

> apple cider thus defined. Claimant's label conveys the impression that this vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from fresh or undried apples. The mere fact that the words "apple cider" and "selected apples" are brought together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well known product. Apples are a well known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. (R. pp. 17 and 18.)

And after stating that the claimant's argument overlooked certain material and controlling considerations, he said:

> One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. (R. p. 18.)

The conclusion of the court is thus expressed:

> A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a

merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples. (R. p. 18.)

And further:

> The law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples, can convey no other idea to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or want of information to sell him something different from what he thinks he is buying. (R. pp. 18 and 19.)

The facts found by the trial court are conclusive if they can be reasonably inferred from the evidence introduced by stipulation or otherwise. In *Old Colony Ins. Co.* v. *Kolmer* 136 N. E. (Ind.) 51, it was held that "where only evidence submitted on trial was an agreed statement of facts, the appellate court must sustain the conviction on which the judgment is based, if such facts or any inference reasonably deducible therefrom tend fairly to support it." See also *Pneumatic Scale Corp., Ltd.*, v. *Mainwaring*, 286 Fed. 378, 379 (C. C. A. 2d Cir.); and *American Concrete Steel Co.* v. *Hart*, 285 Fed. 322 (C. C. A. 2d Cir.).

OPINION OF THE CIRCUIT COURT OF APPEALS.

The views of the Circuit Court of Appeals are indicated from the following quotations from its opinion:

> The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant. (R. p. 31.)
>
> It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. (R. p. 32.)

The court after referring to *United States* v. *Lexington Mill & Elevator Company*, 232 U. S. 399 (which involved adulteration alone), where it was

said that the primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food, said:

> This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business. (R. p. 33.)
>
> It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test. Misbranding is included in the statutory prohibition, because it bears some relation to the conservation of the public health, and not primarily because a purchaser's whims were to be protected, and, though doubtless the test of misbranding a product is whether it is true to name, there is no occasion for overstrictness in applying this test in a case where the public health cannot possibly be jeopardized. In the Standard Encyclopedia, under the caption "Cider," it is said:
>
> "Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. * * * In the United States it is considered that a certain proportion of decay in fruit improves the flavor."

Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from "sound and mature apples, free from rot and ferment," it is clear that condemnation should not be made unless the statute imperatively requires it. Definitions of cider, which include the method or process of its manufacture, written long before public need required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions.

The missing and essential element for the government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. (R. p. 33.)

It is not seriously contended on the part of the government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that, even if such constituent element is removed, it is so immaterial and inconsequential in quantity that the science of chemistry cannot disclose it. This brings this case clearly within the doc-

trine announced in *U. S.* v. *Lexington Mill & Elevator Co., supra,* to the effect that the burden is upon the government to establish by the evidence, not merely a technical, but a substantial, violation of the federal Food and Drug Act, which may render the article injurious to health, or mislead the public to its prejudice or harm, or induce the purchase of a different article than the article desired. (R. p. 34.)

It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples, and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedly the Pure Food and Drug Act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is in truth and in fact buying the identical article indicated by the brand, manufactured from the same basic elements, and none other, the purpose of the statute is accomplished, and the process of manufacture is of no importance. (R. p. 34.)

The statement in the opinion that "It is not seriously contended on the part of the government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored is not apple cider" is entirely erroneous. The government does seriously and earnestly insist

that *such fluid is not cider, and has never been known as cider; and, as will be hereafter shown has never been so defined by any authority.* Furthermore the stipulation shows that such fluid is not obtained *by pressing.*

The difference in the views of the district judge, with whom one of the circuit judges apparently concurred, and the views of the other two circuit judges, is well defined. The view of the District Court was that under the paragraphs of the statute relating to misbranding an article is misbranded if the purchaser is led to believe by the brand that he is purchasing an article made or derived entirely from a certain substance, when in fact he is purchasing an article made wholly or in part from another substance, though the article bought may be about as good as, and but little different in characteristics from the other. On the other hand, the Court of Appeals minimizes the element of deception, and substantially holds that the object of the statute in prohibiting misbranding as well as adulteration is attained if injury to the public health is prevented.

ASSIGNMENT OF ERRORS.

In the petition for writ of certiorari it was insisted that the Circuit Court of Appeals had erred in the following particulars:

1. In failing to hold and decide that misbranding under the Federal Food and Drugs Act must be determined by construing descriptive words upon food and drug labels according to their ordinary and

popular signification to the purchasing public, rather than according to their technical or trade meaning.

2. In holding in substance and effect that the ordinary and popular signification of the terms "Apple Cider" and "Apple Cider Vinegar" were not properly the subjects of judicial notice.

3. In holding that the District Court had erred in taking judicial notice that "Apple Cider" in its ordinary and popular signification meant the native juice of unevaporated apples, and that "Apple Cider Vinegar" meant the vinegar derived by the alcoholic and subsequent acetous fermentations of such juice.

4. In holding in substance and effect that the trade practice or usage prevalent among certain manufacturers and vendors of vinegar, of labeling vinegar derived from evaporated apples as "Apple Cider Vinegar" without disclosure to the purchasing public that such vinegar was so derived, altered the primary signification of these words for the purposes of the Federal Food and Drugs Act.

5. In holding in substance and effect that in order to constitute a misbranding under the Federal Food and Drugs Act, the label must be such as to deceive the purchasers of an article of food or drugs to their substantial injury.

6. In holding that the misbranding provisions of the Federal Food and Drugs Act should be construed as having a relation to the conservation of public health and not as designed to protect purchasers' whims.

7. In holding that the District Court's judgment of misbranding was not sustained by the stipulated facts and the reasonable inferences deducible therefrom. (Pet. pp. 3 and 4.)

BRIEF AND ARGUMENT.

THE DEFINITION OF CIDER ADOPTED BY THE DISTRICT COURT IS UNDOUBTEDLY THE CORRECT ONE; AND THE COURT PROPERLY TOOK JUDICIAL NOTICE THEREOF IN DETERMINING THE MEANING NATURALLY CONVEYED BY THE BRAND USED BY THE CLAIMANT.

By Webster "cider" is defined as "The expressed juice of apples. It is used as a beverage, for making vinegar, and for other purposes," and by way of comment he says "Cider was formerly used to signify the juice of other fruits, and other kinds of strong liquor, but was not applied to wine." In the Standard Dictionary, "cider" is defined as "The expressed juice of apples, used as a beverage, either before or after fermentation; also, sometimes, the juice of other fruits; as, pear cider."

In an article in The Encyclopaedia Britannica relating to cider, it is said:

> Cider and perry (the corresponding beverage made from pears) are liquors containing from as little as 2% of alcohol to 7 or 8%, seldom more, and rarely as much, produced by the vinous fermentation of the expressed juice of apples and pears.

In Nelson's Encyclopaedia it is said:

> Cider is the fermented juice of the apple. The manufacture consists in crushing the apples and squeezing out the juice. The

> juice is poured into casks, where it ferments and clears itself of impurities * * *. As the freshly expressed juice comes from the press, it is placed in covered vats and barrels where it undergoes a rapid fermentation, throwing up a white foaming head of lees.

In Farmers' Bulletin No. 1264, entitled "Farm Manufacture of Unfermented Apple Juice," it is said (p. 4),

> There is some confusion in the use of the terms applied to unfermented apple juice. The term "cider" has been in the past applied to the juice both before and after fermentation, usually with "sweet" or "hard" prefixed to indicate whether fermentation has not or has occurred, but the single word "cider" is also widely used for the unfermented juice.

The courts have frequently recognized the foregoing as the true definition of cider.

Eureka Vinegar Co. v. *Gazette Printing Co.*, 35 Fed. 570, 571 was an action brought against the Printing Company for publishing an article wherein it was declared that the cider manufactured by the plaintiff was subject to the liquor laws of the State of Arkansas; and the material question was whether or not the publication was justified by the facts. In defining "cider," the court (District Judge Caldwell) said:

> The meaning of the word "cider," its method of production, and its general constituents, are matters of common knowledge, and upon which all books of accepted authority agree. *No court would be justified in affecting*

ignorance of these facts, or in closing its eyes to them, in a case requiring their application. In a popular sense, the term "cider" includes the expressed juice of apples, either fermented or unfermented, and hence the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation. In strictness, the juice of the apple before fermentation is simply apple juice, and it is only by fermentation that it becomes cider; and, when the word "cider" alone is used in law or commerce, it is commonly understood to mean the fermented juice of apples.

In *Monroe Cider Vinegar & Fruit Co.* v. *Riordan*, 280 Fed. 624, 626, 627, the question was whether sweet cider was a soft drink within the meaning of the revenue act of 1918, section 628. In defining "cider" the court (C. C. A., Second Circuit) said:

> "Cider," according to the dictionaries, was "formerly any liquor made of the juice of fruits; now the expressed juice of apples, either before or after fermentation." "Hard cider" is "fermented cider." "Sweet cider" is "cider before fermentation or cider in which fermentation has been prevented."
>
> * * * * *
>
> Sweet and hard cider have been designations of the fermented and unfermented expressed juice of apples in common use in the English language long before any man now living was born.

Sterling Cider Co. v. *Casey*, 285 Fed. 885, 886 involved the same question, and in defining "cider" Judge Morton said:

> Cider has been known for centuries. It means, when used without qualification, the pressed-out juice of apples. It was a common beverage long before anybody ever heard of "soft drinks".

The judgment in this case was affirmed by the Court of Appeals on Dec. 21 last; and in its opinion the Court speaks of sweet cider as "a natural fruit juice".

In fact, in no authority is cider defined otherwise than as "the expressed juice of apples". But it appears, especially from some of the encyclopaedias, that the word "cider", when not modified, refers to the juice after alcoholic fermentation.

"Juice" is defined by Webster as "The characteristic fluid of any vegetable or animal substance; the sap or part that can be expressed from fruit, etc." And by the Standard Dictionary "juice" is defined as, "The fluid part of vegetable or animal matter; especially, the expressible watery matter in fruits, containing usually the characteristic flavor, and (chiefly in the plural) the fluids of the body".

The evaporated apples used by claimant retains 20% of the natural quantity of water. By subjecting them to high pressure, a viscid exudation can be squeezed out of them. Can such exudation be properly called the "juice" of the apples? There is

no difference between such a product and that procured by expressing the juice and reducing it 80% by boiling. In each instance, 80% of the water content has been removed.

In *Smith* vs. *Rheinstrom*, 65 Fed. 984, 985, the Circuit Court of Appeals for the Sixth Circuit, speaking through Circuit Judge, (now Mr. Chief Justice) Taft held that cherry juice, from which 80% of the water had been removed by being subjected to heat in a vacuum, was not "cherry juice" within the meaning of the tariff act of 1890, which imposed a tax of 60 cents per gallon upon "Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for". The court said:

> The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different thing from the sap. Thus, the sap of the sugar maple is different from the molasses which is obtained from the sap by boiling, and no one would think of including under the term "sap," if used in the tariff act, the molasses made therefrom. It is true that, for want of a better name, this is called "concentrated cherry juice." It has not been introduced generally enough into commerce to lead to a designation of it by a name which differentiates it from cherry juice other than by adding an adjective descriptive of the change. But concentrated cherry juice is different from cherry juice as molasses is different from sap,

and the difference in the latter case would be quite as great even if molasses were called concentrated sap instead of molasses.

No substance can be genuine apple juice other than that actually expressed from the apple. Such juice is composed of water and solids, one of which is sugar. If after the removal of the water squeezed from the apple and the substitution of other water, it remains apple juice, then the sugar might be removed and other sugar substituted, and it would still be apple juice. And thus, one by one, every ingredient might be removed and an equivalent substituted, and it would still remain apple juice, though not a drop or a particle of it had ever been inside an apple. If this is true, nomenclature means nothing. That which is a chemical equivalent is the thing itself. Oleomargarine is butter, and cotton seed oil is lard.

If, therefore, nothing is apple juice other than that which has been actually expressed from the apple, nothing is apple cider except the apple juice actually expressed from the apple before fermentation and the resultant product of such juice after alcoholic fermentation. Not only is this technically true, but, as above shown, such has been the universal understanding ever since man's knowledge about such matters has been recorded.

VINEGAR HAD BEEN AUTHORITATIVELY DEFINED WHEN THE FOOD AND DRUGS ACT WAS PASSED; AND THEREAFTER THE DEPARTMENT OF AGRICULTURE DECIDED HOW THE PRODUCT HERE IN QUESTION SHOULD BE BRANDED.

By the act of March 3, 1903, making appropriations for the Department of Agriculture for the fiscal year 1904 (32 Stat., Chap. 1008, p. 1158) an appropriation was made for certain purposes among which was "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice."

On December 19, 1904, a report was made to the Secretary of Agriculture by a board representing the Association of Official Agricultural Chemists of the United States and commissioned by the Secretary of Agriculture pursuant to the aforesaid provision submitting for his consideration standards for certain articles, among which was vinegar. This board had defined six classes of vinegar, to wit:

1. Vinegar, cider vinegar, or apple vinegar.
2. Wine vinegar or grape vinegar.
3. Malt vinegar.
4. Sugar vinegar.
5. Glucose vinegar.
6. Spirit vinegar, distilled vinegar, or grain vinegar.

quent acetous fermentations of the expressed juice of apples." *And for the branding of vinegar made from dried-apple products, it was prescribed that:*

> *The product made from dried-apple skins, cores and chops, by the process of soaking, with subsequent alcoholic and acetous fermentations of the solution thus obtained, is not entitled to be called vinegar without further designation, but must be plainly marked to show the material from which it is produced.* (See Food Inspection Decision 140, Department of Agriculture.)

Directions were also given as to the labeling of vinegars containing (1) an addition of water, (2) mixtures of vinegars, (3) containing an addition of boiled cider and coloring matter, (4) mixtures of distilled and sugar vinegars, (5) acetic acid diluted, and (6) a product obtained by distilling wood. In other words, provisions were made for the branding of all kinds of vinegars.

It is true that this decision was not formally adopted as a rule and regulation by the three secretaries; but by section 4 of the Food and Drugs Act the duty of examining specimens of foods and drugs to determine whether or not they are adulterated or misbranded is imposed upon the Bureau of Chemistry of the Department of Agriculture; and that Department is onerated with the duty of initiating proceedings for the enforcement of the law. And as it was established as a rule of action by the Department after such careful investigation when it is pri-

marily the duty of that Department to determine what constitutes adulteration or misbranding, it is entitled to great weight in determining whether or not a brand properly describes the article to which it is attached. In fact if the definition of vinegar by the Board was authoritative as held by Judge Holister, then the branding of claimant's product as "Apple Cider Vinegar" is necessarily a misbranding.

The Department of Agriculture has enforced these regulations by having seized from time to time vinegars misbranded under their terms. As appears from notices of judgments, published as directed by Sec. 4 of the Food and Drugs Act, the following seizures were made and sustained where the misbranding was the same as that alleged in the information filed in this case: No. 5413 filed January 8, 1917, in the District of Rhode Island; No. 5422, filed January 15, 1917, in the District of Massachusetts; No. 8761 filed April 13, 1920, in the Southern District of Ohio; No. 11038 filed July 10, 1922, in the Northern District of Ohio; No. 11326 filed March 10, 1920, in the Eastern District of Wisconsin; No. 1137 filed October 18, 1922, in the Western District of Pennsylvania, and No. 11525, filed January 22, 1923, in the Western District of Pennsylvania. A number of seizures of vinegar have also been made and sustained where the brand violated the Department's regulation, but the misbranding was different from that here charged.

DEFINITION OF CIDER VINEGAR IN STATE STATUTES.

Many State statutes define cider and cider vinegar in terms substantially equivalent to those used in Food Inspection Decision No. 140 of the Department of Agriculture. In some instances, notably Ohio, Pennsylvania, Missouri, Minnesota, Nebraska, and Massachusetts the definitions of these terms are so worded as to unequivocally exclude any product not derived exclusively from pure apple juice. The statutes in those States are as follows:

Ohio Statutes.

The Ohio General Code, Throckmorton, in Section 5786, provides:

> Vinegar shall be made *wholly* from the fruit or grain from which it purports, or is represented, to be made, *and shall not contain a foreign substance* or less than four per cent, by weight, of absolute acetic acid. (99 v. 28, 29, p. 1, 2.)

And Section 5787 provides:

> Vinegar manufactured, offered or exposed for sale, sold or delivered, or in the possession of a person with intent to sell or deliver, under the name of *cider vinegar, apple vinegar, or any compounding of the word "cider" or "apple" as the name or part of the name of vinegar*, shall be the product made by the alcoholic and subsequent acetous fermentations of the juice of apples, *and shall not contain any foreign substance*, drugs or acids, and is laevo-rotatory.

Fully 70 per cent of the vinegar here in question is a foreign substance; that is, was never a part of an apple or apple juice. But the Court of Appeals rightfully regarded the question under this statute the same as that arising under the Federal Food and Drugs Act (R. p. 31).

Pennsylvania Statutes, 1920.

> § 21458. Cider vinegar to be pure apple juice—No person shall manufacture for sale, or offer or expose for sale, *as cider, apple or orchard vinegar, any vinegar not the legitimate product of pure apple juice known as apple cider, or vinegar not made exclusively of said apple cider,* or vinegar into which foreign substances, drugs or acids have (been) introduced as may appear by proper test. (1891, June 11; P. L. 297 § 1.)

In *Commonwealth* v. *Burtnett*, 58 Penn. Supr. R. 604, the Superior Court held that the Act of May 21, 1901, which was in substance identical with the above, prohibited the sale of apple or cider vinegar, where it appears that the product contains approximately eighty per cent of water not derived from the apple but added to the vinegar by the manufacturer in the process of manufacturing. The Court said "we are not concerned with the healthfulness or dangerous qualities of the vinegar sold by this defendant. Our only concern is whether its sale was inhibited by our laws." A writ of certiorari was denied by the Supreme Court.

Revised Statutes, Missouri, 1909.

Sec. 4841. Adulterating vinegar.—Any person who manufactures for sale or offers or exposes for sale *as cider vinegar*, any vinegar not the legitimate product of *pure juice* known *as apple cider*, or *vinegar not made exclusively of said apple cider*, or vinegar into which foreign substances, drugs or acids have been introduced, as may appear on proper tests, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished for every offense by fine of not less than fifty dollars nor more than one hundred dollars, and the costs of prosecution, or by imprisonment in the county jail not to exceed ninety days. (R. S. 1899, § 2282.)

General Statutes of Minnesota, 1913.

3691. Vinegar.—The term "vinegar" as used herein, shall be deemed to include any article or preparation designed or offered for sale or used as vinegar, or as a substitute therefor, or imitation thereof. No person shall sell *as cider vinegar* any article or preparation *not wholly from pure apple juice.*

Revised Statutes of Nebraska, 1913.

2575 "Cider" defined.—For the purposes of this article, "cider" shall be construed to mean *pure apple juice, absolutely free from any foreign substance.* (1897 p. 42; Ann. 9854; Comp. 501.)

2579 Vinegar.—No person, firm or company shall manufacture for sale, offer or expose for sale, sell or deliver, or have in his

possession with intent to sell or deliver, any vinegar, not in compliance with the provisions of this article. *No vinegar shall be sold as apple, orchard, or cider vinegar, which is not the legitimate product of pure apple juice, known as apple cider, or vinegar not made exclusively of said apple cider,* or vinegar into which foreign substance, drugs, or acids have been introduced, or which upon proper test shall contain less than one and six-tenths per cent by weight of cider-vinegar solids, upon full evaporation at the temperature of boiling water. (1897 p. 43; 1909 p. 53; Ann. 9859; Comp. 506.)

Massachusetts, General Laws, Chapter 94, Sec. 171.

* * * whoever labels, brands or sells as *cider vinegar* or as *apple vinegar*, any vinegar not the *ex-clusive* product of the alcoholic and subsequent acetous fermentation of the *pure juice of fresh apples*, shall be punished by a fine of not more than one hundred dollars."

The recital in claimant's label "Guaranteed to comply with all pure food laws" can only mean that if there be a statute, Federal or State, requiring apple cider vinegar to be made exclusively from the pure natural juice of apples, this vinegar meets that requirement. Therefore as to a number of States this statement is absolutely false, and is necessarily a misbranding. In *Wood Mfg. Co.* v. *United States*, 286 Fed. 84, 88 (C. C. A. 7th Cir.) it was held that a coloring material used for coloring cakes, etc., the label on which contained the statement, "War-

ranted. Complies with all requirements," but which contained a salt content of more than 5 per cent, when the Department of Agriculture had a requirement that such a product should contain a salt content of less than 5 per cent, was misbranded because of the false impression thus made. And in *United States* v. *Ten Barrels of Vinegar*, 186 Fed. 400, 401, in which the vinegar was condemned because improperly labeled," a blend of pure boiled apple cider and distilled vinegar," the label also containing a guarantee similar to the one in the label here in question, the court (Judge Quarles) said:

> In other words the ordinary purchaser reading this label would not be led to suppose he was buying distilled vinegar compounded with a foreign element. He is comforted with the assurance: "We guarantee the vinegar sold under our brand to comply with the requirements of the National and State pure food laws."

THE PRIMARY OBJECT OF THE PROVISIONS OF THE STATUTE WHICH RELATE TO MISBRANDING WAS TO PREVENT DECEPTION, AND ENABLE THE PURCHASER TO KNOW THE PRECISE ARTICLE HE IS BUYING.

The act is divided into two parts, one of which prohibits adulteration and the other misbranding. The primary object of the prohibition of adulteration was to protect the public against unwholesome foods, and to prevent an inferior food from being sold as one having a superior quality. On the other hand, the primary object of the provisions against misbranding was to prevent the purchaser from being

deceived in the quality or character of the food purchased. In other words, it was to enable him to know exactly what he is purchasing, regardless of the relative merits of the article which he actually purchases and the one he intends to purchase. There may be no difference in the food value of a lamb chop and a veal chop, but the purchaser has his preference, and should receive the one he calls for.

Nothing can more clearly show this purpose than the language of the act itself. Section 8 of the act (34 Stat. 770) declares:

> That the term "misbranding," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any *statement*, design, or device *regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular*;

and with reference to foods, it is declared that an article shall be deemed to be misbranded:

> First. If it be an imitation of or offered for sale under the distinctive name of another article.
>
> Second. *If it be labeled or branded so as to deceive or mislead the purchaser.*
>
> * * * * *
>
> Fourth. If the package containing it or its label shall bear any *statement*, design, or device regarding the ingredients or the *substances contained therein, which statement, design or device shall be false or misleading in any particular.*

That these provisions were intended to prevent deceptions of all kinds has been repeatedly recognized, and in fact emphasized, by this court.

In *United States* vs. *Antikamnia Co.*, 231 U. S. 654, 665, the court said:

> The purpose of the act is to secure the purity of food and drugs and *to inform purchasers of what they are buying.* Its provisions are directed to that purpose and must be construed to effect it.

In *United States* vs. *Lexington Mill Company*, 232 U. S. 399, 409, the court said:

> The legislation, as against misbranding, *intended to make possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.*

In *United States* vs. *Coca-Cola Company*, 241 U. S. 265, 287, it was said:

> *The aim of the statute is to prevent deception*, and that which appropriately describes a different compound can not secure protection as a "distinctive name."

The language of the court in the foregoing cases was quoted with approval in the case of *United States* vs. *Schider*, 246 U. S. 519, 522, in which it was held that a bottled article labeled "Compound Ess Grape," which contained nothing from grapes, was adulterated, as some other substance had been substituted for that obviously indicated on the label,

and also misbranded, as the label carried a false and misleading name. In condemning the label, the court said:

> The stuff put into commerce by defendant was an "imitation" and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation but on the contrary falsely indicated that it contained something derived from grapes. See *Frank* v. *United States,* 192 Fed. Rep. 864. *The statute enjoins truth; this label exhales deceit.*

In *Weeks* vs. *United States,* 245 U. S. 618, 621, it was held that an article branded "Special Lemon. Lemon Terpene and Citral", which contained alcohol and citral made from lemon grass, was misbranded because it was offered for sale as lemon oil when in truth it was an imitation thereof. The court said:

> It is apparent that the statute specifies and defines at least two kinds of misbranding—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one, but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced.

The following cases decided by lower courts involved facts which presented the same question as that here presented.

In *United States* vs. *Ten Barrels of Vinegar,* 186 Fed. 399, 401, 402, the question was whether vinegar

branded "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar", which did not in fact contain apple cider vinegar, was misbranded. Judge Quarles, who heard the case, said:

> It is matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar.

Again:

> We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "blend" coupled with a specific reference to the pure food act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term "blend". It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend", and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

In *Libby, McNeill & Libby* vs. *United States* (C. C. A. 4th Cir.), 210 Fed. 148, 150, the question

was whether a product labeled "Target Brand of Condensed Skimmed Milk," which contained more than two parts of cane sugar to something less than three parts of the more nearly solid constituents of skimmed milk, was misbranded. The court said:

> The words on the label were all in ordinary use. Each and every one of them could and would be understood by the general public to have been intended to convey their accustomed meaning; that is to say, the average man who read the label would suppose that the can contained skimmed milk which had been reduced in bulk by evaporating or otherwise driving off a part of its fluids.

In *United States* vs. *One Hundred and Fifty Cases of Fruit Puddine*, 211 Fed. 360, Judge Morton held that a product known as "Fruit Puddine" and labeled "Fruit Flavored Puddine," when in fact no fruit was used in the product, was misbranded because the expression led the purchaser to believe that it was flavored with actual fruit.

In *United States* vs. *Two Cases of Chloro-Naptholeum Disinfectant*, 217 Fed. 477, Judge Rose held that a disinfectant which was labeled "Chloro-Naptholeum," but which did not contain as an essential ingredient either chlorine or chlor-napthol was misbranded. The claimant also contended that the general public was not familiar with chemical terms, and that the article had been long sold under that designation, and in fact it had become a distinctive name. But in passing upon the motion for a

new trial, the court said the jury was instructed that a word does not become purely arbitrary until it has lost the descriptive significance both to specialists in the subject and to the general public. It was held therefore that the jury was warranted in finding that the label contained a false suggestion.

THE RULING OF PRESIDENT, NOW MR. CHIEF JUSTICE, TAFT WITH REFERENCE TO THE BRANDING OF WHISKY IS DIRECTLY IN POINT.

The proper label for branding whiskys to comply with both the Internal Revenue Laws and the Food and Drug Acts was given special attention during the latter part of the administration of President Roosevelt and the first part of President Taft's administration. The matter was referred to Solicitor General Bowers; and after extended hearings a ruling was made by him from which an appeal was taken to the President. The question determined was the kinds of liquors that could legally be branded as "whisky." The record was carefully reviewed by the President; and in his opinion he defined the objects of the Pure Food Act to be:

> One to preserve the health of the people, and *the other to prevent their being deceived by label or brand as to the real character of drugs or articles of food offered for sale* (Op. p. 1).

After reviewing the facts he stated that:

> The question, therefore, is not here one of health. It is only one of correct branding *to prevent deceit of the public as to what it is buying* (Op. p. 5).

With reference to the understanding of the public as to what articles were whisky, the President said:

> All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky, and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages *were known to the trade and to the customers as whiskies;* (Op. p. 5).

and again:

> After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term "whisky" in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the Pure Food Act to attempt now to limit the meaning of the term "whisky" to that which modern manufacture and taste have made the most desirable variety (Op. p. 6).

But with reference to spirits made from molasses he said:

> *Neutral spirits made from molasses and reduced to potable strength has sometimes been called whisky, but not for a sufficient length of time or under circumstances justifying the conclusion that it is a proper trade name. The distillate from molasses used for drinking has commonly been known as rum. The use of whisky for it is a misbranding* (Op. p. 8).

It was held, therefore, that all of the different kinds of whiskies first mentioned could be legally labeled "whisky" *because each of the liquors mentioned was and had been for a great many years known by the public as "whisky," but spirits made from molasses, although containing chemically precisely the same elements, could not be legally branded "whisky;" because the public had never known it by that name.*

THE STATUTE WAS DESIGNED TO PUT INTO EFFECT IN THE SALE AND PURCHASE OF FOODS AND DRUGS THE GENERAL PRINCIPLES OF LAW RELATING TO TRADE IN GENERAL.

It is a principle of universal application that the courts will regard with the utmost disfavor any representation by brand, trade-mark, or otherwise, which deceives or tends to deceive purchasers, or any material part of them.

The Prince Manufacturing-Company vs. *Prince's Metallic Paint Company*, 135 N. Y. 24, 37, 39, was an action to enjoin the use of a trade-mark. The facts were that the trade-mark "Prince's Metallic Paint" at first was applied exclusively to a paint manufactured from an ore which was mined from a small tract of land belonging to Prince, containing about forty acres. The paint had been widely advertised as possessing peculiarly good qualities because of the character of ore contained in this small tract. Some time before this action was brought, the complainant had been manufacturing paint from ore, about one-fourth of which was taken from that particular tract and three-fourths from other lands,

some of the paint containing no ore mined from the small tract. The court dismissed the suit saying:

> The label was an assurance to purchasers that the paint to which it was attached was made from the ore of the Prince mine, and was a guarantee that they were receiving paint so manufactured. By affixing the label to paint manufactured from other ores the plaintiff availed itself of the credit which pertained to paint manufactured from the Prince ore bed, to put upon the market paints manufactured from other ores, without so far as appears, disclosing the difference of origin. Purchasers were deceived and the plaintiff reaped the advantage of the deception.

And with reference to the contention that the paint made from ores mined elsewhere than from the Prince tract was just as good, the court said:

> *Nor is it any answer to this point that the article sold under the name of "Prince's Metallic Paint" was as good as that made from the ore of the original mine.* A party can not secure the confidence of the public in an article on the ground that it is made from one material, of which the trade-mark is a guaranty, and then without advising the public, substitute another material and sell that upon the credit of the true article, *and justify the false use of the trade-mark or label on the ground of similar quality.* If this was permitted, it would offer a temptation to fraud, and an inferior article might be palmed off on unsuspecting purchasers. *And although the false*

article is as good as the true one, "the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce."

This case was cited with approval by this court in *Worden* vs. *California Fig Syrup Company,* 187 U. S. 516, 529. That action was brought to restrain the defendant from using a label "Fig Syrup" or "Syrup of Figs" upon a bottle containing a liquid laxative medical compound. The complainant contended that it had an exclusive right to use such description. It appeared, however, that there was practically no syrup or extract of figs in the compound, but that its medicinal quality was due to the senna which it contained. The court held that the brand "Syrup of Figs" upon such a compound was false and misleading, and dismissed the action. The court quoted from an opinion of Circuit Judge Colt (66 Fed. 750) in a case brought by the same company and for the same purpose, in which it was said:

> The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. *It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this prepa-*

> *ration on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words.* The cases are numerous where the courts have refused to grant relief under these circumstances. (p. 534).

The court also quoted from an opinion of the Circuit Court of Appeals (6th Circuit, 73 Fed. 812,817) delivered by Circuit Judge (now Mr. Chief Justice) Taft, as follows:

> The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. *But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined.* (p. 536).

IN DETERMINING WHETHER A LABEL OR A BRAND IS DECEPTIVE, THE COURT WILL GIVE TO ITS WORDS, OR THE PHRASE, THE MEANING GENERALLY GIVEN BY THE PUBLIC.

The important question is whether a material number of those who purchase the article are deceived by the language of the label. If so, though it be technically correct, the article is misbranded.

The language of a statute will be so construed as to effect the object for which the statute was enacted. Therefore different rules of construction apply to different statutes. But, even in tariff acts, the *usual* meaning will be given to words unless it clearly appears that the meaning has been modified by commercial use, and that such commercial meaning was well known when the statute was enacted.

Thus in *United States* vs. *Isham*, 17 Wall. 496, 504, the court said:

> The words of the statute are to be taken in the sense in which they will be understood *by that public in which they are to take effect.* Science and skill are not required in their interpretation, except where scientific or technical terms are used.

In *Saltonstall* vs. *Wiebusch*, 156 U. S. 601, 602, the court said:

> There was no evidence in this case that the word "forgings" was used in any commercial or technical sense among manufacturers, and, in the absence of such evidence, we are bound to presume that it was used in its ordinary and commercially accepted sense of metal shaped by heating and hammering.

In *Swan* vs. *Arthur*, 103 U. S. 597, 598, it was said:

> While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown.

In *Maddock* v. *Magone*, 152 U. S. 368, 371, the court said:

> Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

In *Libby, McNeill & Libby* vs. *United States*, 210 Fed. 148, 150 (C. C. A., 4th Circuit), after recognizing that under the tariff laws the commercial meaning will be given to a word where such meaning is well understood, with reference to the meaning of words in determining whether a brand upon an article of food is violative of the Food and Drugs Act, the court said:

> Pure food laws are intended to protect the public, whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The Supreme Court of Michigan has said that decisions construing revenue acts—
>
> "do not apply to cases arising under the pure food laws of state governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the

> Legislature wisely intended to give them." *Armour & Co.* v. *Dairy and Food Commissioner*, 159 Mich. 10, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

Royal Baking Powder Co. vs. *Emerson*, 270 Fed. 429, 435, 437, 440 (C. C. A. Eighth Cir.), was an action brought to enjoin prosecutions against the plaintiff under the Food and Drugs Act of the State of Arkansas. The Royal Baking Powder Company had for many years used a certain brand upon its cans. Thereafter it changed the leavening agent of the baking powder, and made certain changes in its brand; and the question was whether or not the label thus changed was a misbranding. The court held that the article was misbranded; and in the course of its opinion said:

> The broad purpose of the Arkansas statute is to prevent deception through a label or brand. The deception must be of the average buyer of the product. *Ansehl* v. *Williams*, 267 Fed. 9, this court, filed July 15, 1920. *To ascertain whether a given label would act deceptively, the attitude of the average buyer toward that product at the period the label is put out may be examined.* In no other way can there be proper determination of the probable effect upon him of the label. In most instances there is no definite nor particular information as to this attitude, and therefore the average buyer, in such instances, is treated as a person of average intelligence, exercising ordinary care in ascertaining what he is purchasing. In such cases he is charged with knowledge of what the label fairly tells him.

> The question there gets down to the statements upon the label itself. If they are, in words, form, and arrangement, such as to fairly apprise the average buyer of the truth as to the product, they are sufficient.

Again:

> Misbranding, however, does not rest upon unwholesomeness nor adulteration. *It rests upon deception of the buyer.* That deception consists in inducing him to purchase, under a given mark, brand, or label, an article which is different from that which he intends to buy, and which he has a right reasonably to suppose he is getting under that mark, brand, or label.

And again:

> If the manufacturer makes a change in the article and that change be of a character which would, considering all of the attendant circumstances, naturally affect the attitude of the purchasers of that article, fair dealing and the law require that such purchasers be effectively informed of that change.

WHEN THE BRAND IS DECEPTIVE, ITS ILLEGALITY IS NOT CURED BY LONG USAGE.

In *United States* v. *Coca Cola* Co., 241 U. S. 265, 279, the court said with reference to adulteration:

> Again, articles of food including "proprietary foods" which fall within this condemnation are not saved because they were already on the market when the statute was passed. The act makes no such distinction; and it is to be observed that the proviso of

> section 8 explicitly refers to "mixtures or compounds which may be now or from time to time hereafter known as articles of food." Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the Act.

And in *Federal Trade Commission* against *Winsted Company*, 258 U. S. 483, which was a case arising under the unfair practice provision of the Clayton Act, the court said:

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived.

But it is not necessary to invoke this principle of law in view of the facts of this case.

While in the stipulation, it is agreed that the claimant has been branding its product in the manner specified ever since January 1, 1906, and, further, that for several years prior to the enactment of the Food and Drugs Act and subsequent thereto, vinegar in large quantities, and to a certain extent a beverage made from evaporated apples, were sold in various

parts of the United States as "apple cider vinegar" and "apple cider" by many manufacturers, yet there is nothing in the stipulation from which it can be inferred that the meaning of those terms have become altered even in commerce; or that the product has been accepted as such by either the trade or consumer; but on the contrary the stipulation shows a constant challenge of this label by the pure food officials of the Federal Government. Nor is it stipulated that a large *per cent* of the total quantity of vinegar made from apples and shipped in commerce is manufactured from evaporated apples. The stipulation says that a large *quantity* has been manufactured; but it is further agreed that in 1920 there were seven hundred and twenty manufacturers of cider and vinegar, and the value of the product manufactured was $24,671,000.

THE BRANDING OF VINEGAR MADE FROM EVAPORATED APPLES AS "APPLE CIDER VINEGAR" IS GROSSLY DECEPTIVE.

The facts set forth in the stipulation, though manifestly worded most favorably to claimant, together with such knowledge as every one having the least experience possesses, show beyond question that the brand "apple cider vinegar" upon vinegar made from evaporated apples "exhales deceit."

The stipulation recites that:

> It is not disputed or questioned in this case that the juice of unevaporated apples, when subject to alcoholic and susbequent acetous fermentation, is entitled to the name "apple cider vinegar" (Par. 8, p. 12.)

This stipulation is equivalent to saying that vinegar produced by fermentation of the expressed juice of fresh apples has generally been known as, and in fact is, "apple cider vinegar." But such a stipulation was wholly unnecessary, because as above shown the knowledge of such fact is universal, and the courts must take cognizance of it. *On the other hand, no facts are stipulated from which it can reasonably be inferred that the consumers of vinegar or any substantial part of them have ever understood that the term "apple cider vinegar" applies to vinegar fermented from a fluid containing 80 per cent of water substituted for the water expressed from apples; or have any knowledge that there is upon the market a vinegar branded and sold as "apple cider vinegar," which in fact is manufactured from evaporated apples.*

"Cider" is the expressed juice of apples, the juice with all of its constituents, and without any substitution, as it comes from the apple. No one ever heard of any substance, about 75 per cent of which is a substitute, being called cider until some manufacturers of pectin desired to realize additional profits by selling this by-product as genuine cider. Necessarily, apple cider vinegar must from its very terms be taken to mean vinegar resulting from the fermentation of apple cider; and, if apple cider is nothing but the actual fluid expressed from apples, apple cider vinegar is nothing but vinegar made by the fermentation of such fluid. And the public universally so understand.

In fact claimant's opposition to being required to show in its label that the product is made from evaporated apples is a concession that it is deceiving the public. In its brief filed in the Circuit Court of Appeals (p. 3), it said:

> "These labels, or brands, through their use for the last sixteen years, have acquired an immense value and *claimant will suffer an irreparable loss, and no benefit will accrue to consumers or purchasers, if the Government succeeds in arbitrarily forcing claimant to distinguish that part of its product made from apples which have been evaporated from that made from apples which have not been evaporated*, when the product in each instance is in fact identical, differing only in the process of manufacture."

And in its motion to advance the cause in the Court of Appeals it said:

> Plaintiff in error is one of the largest manufactures of vinegar in the United States, and until the present controversy in regard to the labeling of vinegar is settled *it is very seriously handicapped in the manufacture and distribution of its product.* (R. p. 27.)

If claimant will suffer an irreparable loss if required to tell the truth in its label, it is now making an enormous profit because the truth does not appear in the label. Its loss will result from the unwillingness of the public to buy for "Apple Cider Vinegar" a vinegar made from evaporated apples; which means that the public is now buying its product labelled

"Apple Cider Vinegar" because it does not know that it is made from evaporated apples. The difference between the quantity of sales now made and the price now received for the product, and the sales it would make and the price it would receive if required to show in its brand that this vinegar is made from evaporated apples is the measure of the deception that claimant is now practicing upon the public.

REASONING AND ILLUSTRATIONS OF THE CIRCUIT COURT OF APPEALS.

The Court of Appeals' reasoning and illustrations are wholly beside the mark. It concedes that the public may have a prejudice against vinegar made from evaporated apples, but supposes it is the result of ignorance. But one has a right to his choice regardless of how that choice arises. Suppose a customer should go into a store where there was kept unlabelled vinegar made from fresh apples and also vinegar made from evaporated apples, and should specifically request and pay for vinegar of the former kind, would it be honest to give him vinegar of the latter kind? If a merchant should give to a customer vinegar made from evaporated apples stating falsely that it was made from fresh apples, and charge the price at which fresh apple vinegar is sold, would it not be such a flagrant deception that the customer could recover the difference in the prices of the two kinds of vinegar? Yet that is precisely what claimant is doing, except instead of making the false statement by word of mouth it is boldly and prominently inserted in the label which the Statute requires

to state the truth; *and thus under the decision of the Court of Appeals the Statute itself is made to assist in imposing the deception upon the public.*

Congress recognized that the public has its prejudices with reference to articles of food, some of which are probably unreasonable and not well founded; and it therefore declared it a misbranding if the "label shall bear any statement regarding the ingredients, which statement shall be false or misleading *in any particular.*" Congress therefore prohibited the Courts from hunting around in each particular case to ascertain whether the public's prejudice was reasonable or unreasonable. The public is entitled to its prejudices; and it is not for the Courts to say whether they are well or ill founded. In fact the prejudices and inclinations of the public control in a very large measure the prices of articles moving in commerce.

One illustration used by the Court of Appeals is maple sirup. It says that it is the same sirup whether made by reducing the sap of the maple by boiling to the proper consistency, or by reducing it to sugar and then adding enough water at the proper temperature to reconvert it into sirup. But without considering the difference between the words "Juice" and "Sirup," or whether the illustration is precisely parallel, a complete answer is, that, if *the public knows that genuine maple sirup is made both ways, and recognizes that one is as good as the other, either can be branded "maple sirup."* In fact, the board

established under the Act of March 3, 1903, so found, and defined maple sirup as, "Sirup made by the evaporation of maple sap or by the solution of maple concrete." (See circular No. 13). The Court also illustrates with cream separated from the remainder of the milk by the natural process of rising to the top and cream separated by the operation of a separator. But that illustration does not present a condition at all parallel. In each instance it is the very cream that came from the cow without any substitution whatever. And what the public wants is cream.

A more apt illustration is condensed or evaporated milk. Suppose sufficient water be added to restore such an article to its fluid condition, could it legitimately be sold as fresh milk?

THERE IS IN FACT A VERY MATERIAL DIFFERENCE BETWEEN GENUINE APPLE CIDER VINEGAR AND THE PRODUCT SEIZED IN THIS CASE.

But the so called prejudice of the public against vinegar made from evaporated apples is not unfounded and unreasonable, because the facts clearly show that there is a material difference between the two kinds of vinegars.

It is stipulated that:

> There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from evaporated apples (Par. 5, p. 12).

The wording of this paragraph is very peculiar. It is not said that the product seized is in fact not in-

ferior to that made from evaporated apples, but that such inferiority is not claimed. In other words, it is not relied on by the Government. This attitude was taken because the question of the relative merits as a food between the two products was not, so far as misbranding is concerned, regarded as a matter of any importance. In fact, the stipulation means practically nothing, because it does not define the meaning of the word "inferior" as there used. Presumably, it means that the product seized is not less wholesome than genuine apple cider vinegar, or probably that it contains as much acetic acid. But those are not the only tests of merit. It is also stipulated that this product is similar in taste and in composition to the vinegar made from unevaporated apples (Par. 4, p. 12). But as provided in paragraph 7, samples of both kinds of cider were submitted to the trial court, and he found that "There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar." (R., p. 15.)

It is further stipulated in paragraph 3 (p. 11):

> Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no acceptable test or method of analysis is provided so far as parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration.

Manifestly the difference in appearance and taste observed by the court is due to the escape of congeneric substances in dehydration. Anyway, the difference exists; and the popularity of many an article has been established on differences no more substantial. Many brands of liquors became popular because of but very slight differences in odor and taste, and the same is true with reference to tobacco and cigarettes. And who can describe the shades of differences in odors of delicate perfumes, and yet their popularity depends upon these shades. So with vinegar which is used in salad dressings and upon different articles of food consumed without further preparation, their odor and taste materially depend upon the kind of vinegar used, and slight differences may mean much in determining the desirability of the food.

The differences noticed by the Court are what have made genuine cider vinegar so popular. Dilute alcohol is the base of all vinegar, and whether produced from grain, molasses, or glucose has the requisite acidity and the color, flavor, and aroma peculiar to the substance from which the alcohol was derived. The popularity of genuine cider vinegar is not because of its acidity, but because of its characteristic and pleasing color, flavor, and odor, and it is really this flavor and boquet which the consumer expects and is paying for when he buys genuine cider vinegar. The consumer is being deceived, therefore, when he has sold him as genuine cider vinegar a vinegar which

simulates it in color and analytical composition, but having been made from dried apples is necessarily deficient in certain irreplaceable flavors and boquet which have been dissipated in the process of evaporation and sulphuring of the raw material. It is hardly accurate to say that genuine cider vinegar is a manufactured product. It is a natural product which nature produces without the aid of man. That is to say, alcohol develops in the native juice of a mature apple, and the alcohol acetifies into acetic acid through nature's operations without artificial aid.

Another fact appears in paragraph 4, (p. 11) which is suggestive. It is there said that, as a result of the process first described, the liquid obtained "is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used," and "carries a *small and entirely harmless* quantity of sulphur dioxide, which is removed during the process of fining and filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds."

If the quantity of sulphur dioxide is entirely harmless, why remove it? In the United States Dispensatory in describing the properties of barium carbonate it is said: "Barium carbonate acts as a poison on the animal economy. Its only pharmaceutical use is to prepare barium chloride." Why treat this fluid which is to be converted into vinegar

with this poisonous substance to eliminate a *harmless* trace of sulphur dioxide? *Manifestly, it is done for no other purpose than to destroy positive and certain evidence of the character of the product;* and while it may be, as further stipulated, that the trace of barium which is left after the chemical process by which the sulphur dioxide is removed is harmless, yet suppose that inadvertently or by mistake an excessive quantity of this poisonous substance were introduced, more than would be neutralized by the sulphur dioxide, the serious effects of such a mistake are apparent.

NO VALID OBJECTION TO THE LABEL SHOWING THE FACTS.

What valid objection can claimant have to branding its product so as to show the exact facts? It claims that vinegar made from evaporated apples is just as good as vinegar made from the juice of fresh apples. If this is true, the public has no way of learning that fact except by using the two products *knowingly;* and in time claimant's product can be sold at the same price without the use of the deceptive brand. Under the directions for labeling adopted by the Department of Agriculture, this product should be labeled "Vinegar produced from evaporated apples." If sold under such label, the purchaser would know exactly what he is buying. As it is, the purchaser believes he is buying vinegar manufactured from the juice of fresh apples, and certainly has no knowledge that it is made from evaporated

apples; and if he is satisfied with its quality vinegar made from evaporated apples receives no credit from such satisfaction.

As said by Judge Rose in *United States* v. *Two Cases of Chloro-Naptholeum Disinfectant*, 217 Fed. 477, 484: "Claimant points out that for many years it has sold large quantities of its products under this particular name. It has done no harm to anybody. It asks why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so will be both costly and inconvenient. Nevertheless, it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid, enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. *He can not afford to say anything about his goods which is not in every reasonable sense, and from the standpoint of every well-informed person, true.*"

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

JAMES M. BECK,
Solicitor General.

J. A. FOWLER,
Special Assistant to the Attorney General.

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No. 330.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,
Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

BRIEF OF DOUGLAS PACKING COMPANY, CLAIMANT.

JOHN G. WHITE,
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No. 559.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,
Petitioner,

vs.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,

Petitioner,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY,

Claimant.

BRIEF OF DOUGLAS PACKING COMPANY, CLAIMANT.

STATEMENT OF THE CASE.

This case originated in the United States District Court for the Northern District of Ohio, Eastern Division, and involves the libeling of ninety-five barrels, more or less, apple cider vinegar, manufactured by claimant, Douglas Packing Company. The barrels were marked on one end—

"Douglas Packing Company
Excelsior Brand apple cider vinegar
made from selected apples
Reduced to 4 per centum
Rochester, New York."

and on the other—

"Guaranteed to comply with all
Pure food laws.
Douglas Packing Company,
Rochester, New York."

(Rec. P. 5), and had been shipped by claimant from its plant at Fairport, New York, to Fisher Brothers at Cleveland, Ohio. The libel charges that the vinegar was *adulterated* * under Paragraphs First and Second of Section 7 of the Pure Food & Drugs Act, in that vinegar made from apples or apple products that had been evaporated or dried, had been mixed, packed with and substituted wholly or in part for the article.

It also charges that the vinegar, being made from apples that had been evaporated, was *misbranded* under general paragraph, Section 8, and Paragraphs First, Second and Fourth of Section 8 of said Act, in that (a) the statement on the label "Vinegar made from selected apples and manufactured to comply with all pure food laws" was false and misleading, and deceived and misled the purchaser, and, (b) the vinegar in question was an imitation of and offered for sale under the distinctive name of another article, to-wit, "Apple Cider Vinegar." (Rec. pp. 1-2.)

Douglas Packing Company, claimant and defendant in error herein, intervened, claimed the vinegar, and, answering the libel (Rec. pp. 5-6), admitted the shipment, and that in the manufacture thereof, apples that had been first evaporated had been used, but denied that the vinegar was either adulterated or misbranded by reason of being thus manufactured.

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* NOTE: Italics throughout the brief are ours unless otherwise stated.

A jury trial was waived, in writing (Rec. p. 13), and the case tried to the Court on an agreed statement of facts (Rec. pp. 10-13), in connection with which statement, claimant submitted the following exhibits:

(1) Sample of unfermented liquid from apples which had not been evaporated.

(1a) Sample of unfermented liquid from apples which had been evaporated.

(2) Sample of fermented liquid from apples which had not been evaporated.

(2a) Sample of fermented liquid from apples which had been evaporated.

(3) Sample of vinegar seized in the within action.

(3a) Sample of vinegar made from apples which had not been evaporated. (Rec. p. 14.)

There is no claim or charge by the Government that the vinegar libeled is below the prescribed standard, impure, unwholesome, or inferior to that made from apples which have not been evaporated. The sole objection is to the use of apples which, for economy, have been evaporated.

The District Court held that there was no *adulteration* within the meaning of Paragraph First, Section 7 of the Act, made no ruling as to Paragraph Second, Section 7, but sustained the charge as to *misbranding* for the reason that the vinegar was not made from the juice of "fresh apples," on the theory that the manufacture of vinegar from apples that had been preserved through being subjected to evaporation was contrary to the various definitions of apple cider vinegar of which the Court took judicial notice, and to the popular notion of the method of the manufacture of that kind of vinegar. A judgment of forfeiture and condemnation was entered. (Rec. pp. 20-22)

There was no evidence to support such a theory, nor does it follow from the agreed statement of facts, inasmuch as it there affirmatively appears, that *since prior to the enactment of the Food and Drugs Act, and subsequent thereto, claimant, and other manufacturers, have produced and sold, in various parts of the United States, vinegar in large quantities, and to a certain extent a beverage made from evaporated apples as "apple cider vinegar" and "apple cider,"* respectively (Agreed Statement of Facts, Paragraphs 9-10), (Rec. pp. 12-13).

Furthermore, the general definitions, the standards, and the circulars issued by the Department of Agriculture, each defining "Vinegar" as the product realized from the alcoholic and subsequent acetous fermentation of the *expressed juice of apples*, do not support such a theory unless the word "apples" is limited and qualified by interpolating the words "fresh" or "unevaporated."

On proceedings in error, instituted by the claimant, Douglas Packing Company, the Circuit Court of Appeals for the Sixth Circuit, reversed the District Court, holding, in effect, that apples, and the juice thereof, being the exclusive product from which claimant's vinegar was manufactured, there being no substitution, the vinegar was apple cider vinegar, and therefore not misbranded, saying—

> "Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the

Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. * * * In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court cannot judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant." (Rec. p. 33.)

"*The important question in each case is whether the product is the identical thing that its brand indicates.* If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

It appears from the agreed statement of facts that the cider from which this vinegar was made, was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only in so far as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

The conservation of our food products is of some concern to the public and, perhaps, second in importance only to the demand for pure and unadul-

terated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, *and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.*" (Rec. pp. 31-32).

A petition for re-hearing was filed by the Government and refused, and the application was then made to this Court for a writ of certiorari, which was granted.

The Government is contending, as one of its assignments of error, that the Circuit Court of Appeals erred in holding that the District Court's judgment of misbranding was not sustained by the stipulated facts and the reasonable inferences deducible therefrom.

The District Court found that the samples submitted showed some slight differences in taste and color, but that all, whether made from apples that had been evaporated or apples that had not, tasted like cider and vinegar. No preference was indicated. The trial Court was reversed, as we before stated, for the reason that to find that nothing is apple cider unless expressed from fresh apples is wholly inconsistent and contrary to the facts in the case.

It is true that the case being tried upon an agreed statement of facts, the parties made the District Court the arbiter of those facts. This does not mean, however, that if the trial Court's decision is against the weight of the evidence, based on inferences contrary to and unsupported by the facts, that the appellate court may not reverse the decision.

STATEMENT OF FACTS.

The Government and claimant collaborated in preparing a statement of facts which eliminated all unimportant and irrelevant matters, and the case was tried to the Court on that agreed statement of facts.

In its brief the Government submits a digest of that statement, omitting therefrom certain facts which it may now consider unimportant, but which we regard as necessary and essential to a complete consideration of the case. The agreed statement is short, and for accuracy and convenience, we ask the Court's indulgence if we reproduce it in full and refer to it hereafter in our brief by paragraph number rather than by page of the record.

"STATEMENT OF FACTS.

(1) Claimant, the Douglas Packing Company, is a New York corporation, with its principal office in the City of Rochester, New York, and with factories at Fairport and Canastota, New York. *It is now and has been since January first, 1906, engaged in manufacturing food products from evaporated and unevaporated apples.* From *fresh apples* it manufactures Apple Cider and Apple Cider Vinegar, and from the *evaporated apples* it manufactures, by a process which is fully described in the section numbered (4) hereof products which it designates as 'Apple Cider' and 'Apple Cider Vinegar.' *From the pulp of unevaporated apples and the pulp of the evaporated material* it manufactures a product which it calls 'Pectin.'

(2) During the apple season, between *about September 25th and December 15th*, sound, mature, unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating

plants, located, one in Vermont, one in Massachusetts and one at Canastota, New York.

(3) With such apples as are evaporated by claimant the most approved process for dehydrating fruits is used. In dehydrating, small quantities of sulphur fumes are used to prevent rot, fermentation, and the consequent discoloration. *The principal result of the dehydration process is the removal of about eighty per cent. (80) of the water.* Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. *Only mature, sound fruit, free from rot and ferment, can be economically and advantageously used.*

(4) In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A weight of more than one (1) ton is then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar.

Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and

filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds.

The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples.

Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water is added as aforesaid, and in the process of fining and filtration an additional chemical agent is used to precipitate any sulphur compounds present and resulting from dehydration.

After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

The vinegar made from the resultant liquid is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

It is conceded that the vinegar involved in this proceeding is vinegar made from dried or evaporated apples by substantially the foregoing process.

(5) *There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from unevaporated apples.*

(6) *Since January 1, 1906,* until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples, as 'Apple Cider' and 'Apple Cider Vinegar,' selling its vinegar under the brand 'Excelsior Brand Apple Cider Vinegar Made from Selected Apples,' or 'Sun Bright Brand Apple Cider Vinegar Made From Selected Apples.' At the time of the commencement of this action, claimant was so manufacturing and selling about 100,000 barrels of vinegar a year.

(7) Each of the parties hereto may submit such exhibits, properly labeled and identified, as they desire of the liquids from unevaporated apples and evaporated apples, including samples of the vinegar seized in this jurisdiction.

(8) It is not disputed or questioned in this case that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name 'apple cider vinegar.'

(9) *For several years prior to the enactment of the Federal Food and Drugs Act and subsequent thereto, vinegar in large quantities and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as 'Apple cider vinegar' and 'Apple cider,' respectively, by many manufacturers,* including the American Fruit Products Company, of which Company Robert Douglas, President of claimant company, had been Production Manager. The American Fruit Products Company operated eleven plants located in New England, New York and Michigan.

(10) *Since January 1, 1906, the claimant has manufactured such products and sold them labeled 'Apple Cider Vinegar' and 'Apple cider,'* respectively, and in doing so acted in good faith.

The United States Department of Agriculture has never sanctioned such labeling and its attitude with reference thereto is evidenced by the definition of 'apple cider vinegar' set forth in circulars 13, 17, 19 and 136 of the Office of the Secretary of the United States Department of Agriculture and Food Inspection Decision 140.

(11) From the report of the United States Census Bureau it appears that in 1910 there were 430 manufacturers of cider and vinegar, and the value of the product manufactured was $2,254,000.-00 and from the report of the Census Bureau of 1920, there were 720 engaged in the manufacture of cider and vinegar, and the value of the product manufactured was $24,671,000.00."

Claimant is one of the largest manufacturers of apple cider vinegar in the United States, and since prior to 1906, *in common with many other vinegar manufacturers*, has been making vinegar *from apples which have been preserved through evaporation as well as from unevaporated apples.* The vinegars of claimant in each instance are manufactured *by the same process, in the same receptacles*, and except for the harmless trace of barium present in that made from apples which have been evaporated (the Government making no charge by reason of this barium), *are alike in taste, composition, color and analysis.* The vinegars are uniform products manufactured during the apple season, from apples which have not been evaporated and during the balance of the year, from apples which have been evaporated, the process of manufacturing, and not the finished product, varying according to the season, and are, therefore, all labeled "Excelsior Brand Apple Cider Vinegar, made from Selected Apples," or "Sun Bright Brand Apple Cider Vinegar made from Selected Apples." (Statement of Facts, Paragraphs 1 and 4).

These labels and brands, through use for the past eighteen years, or more, on this uniform vinegar, have consequently acquired great value, and to require claimant now to distinguish that part of its vinegar made from apples which have been subjected to the process of evaporation from that made from apples which have not, when the vinegars differ only in the process of manufacture, would arbitrarily subject claimant to a great loss incident to establishing new labels and result in no benefit whatever to consumers and purchasers.

The vinegar being the same in each instance, and the purchaser being concerned only with the *quality, character* and purity of the ultimate product, any labeling requiring a distinction between identical products, because of process of manufacture alone, should be optional and not compulsory.

QUESTIONS IN THE CASE.

The libel as filed in the instant case charged adulteration and misbranding, contrary to the Food and Drugs Act.

> "ADULTERATION.—In the case of food:
>
> First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> Second. If any substance has been substituted wholly or in part for the article." (Sec. 7, 34 Stat. L. 769).

The District Court found no adulteration, and inasmuch as the agreed statement of facts practically precludes that question, and the Government has abandoned it, we may eliminate adulteration from further consideration.

"MISBRANDING:

Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * *

That for the purposes of this Act an Article shall also be deemed to be misbranded:

In the case of food:

First: If it be an imitation of, or offered for sale under, the distinctive name of another article.

Second: If it be labeled or branded so as to deceive or mislead the purchaser, * * *

Fourth: If the package containing it or its label shall bear any statement, design, or device regarding the ingredients, or the substances contained therein, which statement, design, or device shall be false or misleading in any particular." (Section 8, first, second and fourth paragraphs, 34 Stat. L. 769, as amended 37 Stat. L. 416 and 732.)

Conceding that only mature, sound apples, *selected* so as to be free from *rot and ferment* can be evaporated; *that evaporation merely changes the form of the apple* to the extent of removing about eighty per cent. of the water thereof; that the *same receptacles* are used in manufacturing vinegar from apples that have been evaporated as from apples which have not been evaporated; that *the process is identical in each instance,* except that in the case of apples which have been evaporated the slight quantities of sulphur taken up during evaporation are removed, and the water which has been evaporated out is restored, the product in each case being identical except for a harmless trace of barium (and was so found by

the District Court), (Rec. p. 15), the question is whether vinegar so produced through the use of apples which have been subjected to evaporation is misbranded if labeled "Apple Cider Vinegar made from Selected Apples."

Does the fact that the apple, from the time it is picked from the tree to the time it is ultimately dejuiced for vinegar purposes, is held and preserved through evaporation or dehydration rather than by storage in the raw state, it being admitted that dehydration or evaporation removes only a *portion of the water in the apple*, necessarily mean that when this water is restored and the manufacture of the vinegar again taken up and carried through, just as with an apple which had not been evaporated, the vinegar so produced is not entitled to be labeled "Apple Cider Vinegar"?

Is the manufacturer of apple cider vinegar, to be exempt from the charge of misbranding, when using the label "Apple Cider Vinegar made from Selected Apples," limited to the use of the juice of apples which have not been evaporated, to the exclusion of the juice of apples, which, to facilitate preserving and shipping and to conserve the apple crop, have been evaporated, when the vinegar, which is the ultimate product, is in each case pure, wholesome, and to all intents and purposes identical?

Is apple cider vinegar, which is defined as being the product made by the alcoholic and subsequent acetous fermentation of the expressed juice of apples, a product that can be manufactured only from apples which have not been evaporated? Is the term "apples" as so used, a generic or class term, and is it subject to the limitation and strict interpretation which the Government seeks to place upon it, namely, that it means only "fresh" or "unevaporated" apples?

Apple cider vinegar is a manufactured article, twice removed from its original form of apple juice. The manufacturer of all apple cider vinegar starts first with apples evaporated or unevaporated from which is secured juice. The juice, after the alcoholic fermentation of its sugars, becomes hard cider. The hard cider, through oxidation of its alcohol to acetic acid becomes vinegar, and this vinegar, either ultimately, or during the process of its manufacture, by the addition of pure distilled water, is diluted to the acetic acid strength required for condiment purposes. *The juice from the apple which has been evaporated ferments and passes through the same stages in becoming vinegar as does the juice of the apple which has not been evaporated.* Apples, and nothing else, being used in manufacturing both vinegars, in the case of apples which have been evaporated the process varying to the extent only of removing and later replacing part of the water of the apples, the alcoholic and acetic fermentation being the same, the ultimate product must necessarily be the same. To require a label to distinguish identical products solely because of the process of manufacture, is not the purpose or intention of the Pure Food and Drugs Act.

COMMENTS ON THE FACTS.

At all times during the prosecution of this case there has been a determined, studied and well defined effort on the part of our opponents to create the impression that claimant is not regarded by reputable vinegar manufacturers as a legitimate vinegar maker; that claimant manufactures vinegar only from apples which have been evaporated; that its vinegar is a cheap, inferior article; that its vinegar is made from a substance other than apples; that too great an amount of water is used in the

process of manufacture; that its vinegar is a waste vinegar, the by-product of pectin.

In furtherance of this effort, there is a constant endeavor, by inference and otherwise, to give to the plain recitals in the agreed statement of facts, and to some of the court's findings, a strained construction and interpretation.

Not only that we may clearly present the simple question involved in this case, but so that claimant's cause may be fairly considered, all unwarranted impressions should first be eliminated. The record in the case is claimant's best argument, and a most cursory examination will suffice.

Claimant could not produce and market 100,000 barrels of vinegar a year and distribute its product throughout the United States, and be other than a manufacturer in good standing in the trade.

Agreed Statement of Facts, Paragraph 6:

> "Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples. * * * At the time of the commencement of this action, claimant was so manufacturing and selling about 100,000 barrels of vinegar a year."

Agreed Statement of Facts, Paragraph 10:

> "Since January 1, 1906, the claimant has manufactured such products and sold them labeled 'Apple Cider Vinegar' and 'Apple Cider', respectively, *and in doing so acted in good faith.* * * *"

The 100,000 barrels of vinegar a year includes vinegar made from unevaporated as well as evaporated apples, claimant manufacturing all that it can from unevaporated apples during the apple season.

Agreed Statement of Facts, Paragraph 1:

"* * * It is now and has been since January first, 1906, engaged in manufacturing food products from *evaporated* and *unevaporated* apples. From *fresh* apples it manufactures Apple Cider and Apple Cider Vinegar, and from the *evaporated* apples it manufactures, by a process which is fully described in section numbered (4) hereof products which it designates as 'Apple Cider' and 'Apple Cider Vinegar'. * * *"

Paragraph 2:

"During the apple season, between about September 25th and December 15th, sound, mature *unevaporated* apples are used by claimant, and for the balance of the year *evaporated* apples of like quality."

Paragraph 4:

"Claimant employs the same receptacles, equipment and process of manufacturing for *evaporated* as for *unevaporated* apples."

Paragraph 6:

"Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from *unevaporated* as well as *evaporated* apples."

There is no evidence whatever that vinegar made from evaporated apples is cheaper than that manufactured from unevaporated apples. Relative costs do not appear in the case. Is it not more reasonable to infer, from a consideration of claimant's process (if inferences are permitted), that the cost of producing vinegar from apples which have been evaporated is greater, inasmuch as the expense incident to the process of evaporation and the additional storage and handling are not present when the unevaporated apple is used?

It is unequivocally conceded that so much of claimant's vinegar as is manufactured from the apple which has been evaporated is not inferior to that manufactured from the unevaporated apple.

Agreed Statement of Facts, Paragraph 5:

> "There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from *unevaporated* apples."

A comparison of the analysis of the sample of vinegar seized in this action with the standard prescribed for vinegar by the Government, establishes that the vinegar seized is superior to prescribed Government standard.

Government Standard	*Analysis of Vinegar Seized*
Alcohol—Amount not specified	1.47
Acid, grams per 100 cc. not less than 4.0..	4.44
Solids, grams per 100 cc. not less than 1.6	2.33
Reducing sugars—Actual amount not specified, but must be not more than one half of the total solids	0.39
Non-sugar Solids, is the difference between total solids and the reducing sugars. Actual amount not specified..	1.94
Ash, grams per 100 cc. not less than 0.25..	0.40
Percentage of ash in non-sugar solids,— Not specified	20.6%
Alkalinity of Soluble Ash, not less than 30.00 cc. of decinormal acid	40.0 cc
Percentage of reducing sugars in solids, not more than 50%	16.7%
Soluble $F_2 O_5$ (phosphoric acid) milligrams per 100 cc. not less than 10.	10.1

Polarization, must be laevo-rotatory, that is, must show a minus polarization	— 1.5°V
Ratio non-sugar solids to the sum of alcohol and acid—Figure not specified	32.8%
Sulphates—Not specified	Slightly above normal

Furthermore, the New York case, in which case claimant's present label was sustained and which we will cite later, conclusively established the excellence of claimant's product.

Judge Westenhaver did not find, after tasting the various samples submitted, that the vinegar seized was inferior in taste or flavor to that made from fresh apples. His only finding was that in all the samples submitted there were slight differences in taste and color (Rec. p. 15), but *all* samples had the appearance and taste of cider and vinegar. *No preference was expressed.* A difference in appearance and taste would be apparent in any samples of ciders and vinegars, whether the samples were all made from apples which had been evaporated or not, since the taste of all cider or vinegar will vary, depending on whether it was made from a sour or sweet apple, early or late apple, green or ripe apple, sound or imperfect apple, selected or cull apple, the season when made, whether aged in barrels, the extent of fermentation, the manner in which it was bottled, and how it was handled generally. It is a matter of common knowledge that, as vinegar stands or is exposed to the air, it necessarily changes in color through further oxidation.

There is no justification whatever for the comment that any difference in the taste of the vinegars is due to the escape "of congeneric substances in dehydration,"

for the Agreed Statement of Facts, in paragraph 4, finds the only difference between the vinegars is that one carries a trace of barium, which trace in no way affects the character or quality of the vinegar or renders it deleterious or injurious to health.

Furthermore, in Paragraph 3 of the Agreed Statement of Facts it is admitted that

> "in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. * * * The principal result of the dehydration process is the removal of about eighty per cent. of the water."

Under such conditions is it reasonable to suppose that there would be any noticeable difference between the taste, flavor or color of vinegar made by either process?

Again, the fact that only perfect fruit can be evaporated (Agreed Statement of Facts, Paragraph 3):

> "Only mature, sound fruit, free from rot and ferment, can be economically and advantageously used."

would necessarily mean, (if we may again indulge in inferences), that the vinegar from the apple which is evaporated would be superior to the other, especially in view of the so-called general knowledge as to the character of cider apples.

Cider apples, loaded in bulk and carried in box cars for weeks after loading, subjected to various temperatures, necessarily are bruised, and rot and decay, and a large part of the value of the apple is thus lost which otherwise is saved through evaporating the apples at the

point of production and shipping in the preserved condition.

The Agreed Statement of Facts, as we have already observed, states repeatedly that the only substance used by claimant is apples. In the apple season fresh apples are used, thereafter, evaporated apples of like quality are used.

Agreed Statement of Facts, Paragraph 2:

> "During the apple season, between *about September 25 and December 15th,* sound, mature unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating plants, located, one in Vermont, one in Massachusetts and one at Canastota, New York."

The quantity of water in the vinegar manufactured from evaporated apples is the same as that in the unevaporated apples.

Agreed Statement of Facts, Paragraph 4:

> "In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples *to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added.* * * *"

And the resultant liquid in the case of evaporated apples (Agreed Statement of Facts, Paragraph 4)—

> "* * * is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide which is removed during the process of fining and filtration by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds."

The sulphur dioxide present in the juice is removed as part of and during the process of fining and filtration, with a view to clarifying and producing as uniform and as pure a juice as possible, and with no ulterior motive whatever. This trace of sulphur dioxide has served its purpose in preserving the apple, which is the container for the juice, and, its presence being no longer required, it is removed from the juice just as are the bits of pulp, or any other substances or particles therein, not useful in or essential to the juice for vinegar purposes.

Our opponents say finally:

> "No one ever heard of any substance, about seventy-five per cent. of which is a substitute, being called cider, until some manufacturer of pectin, desired to realize additional profits by selling this by-product as genuine cider." (Government Brief, Page 48.)

Later, in our brief, we will show that the Department of Agriculture advocates a process for removing 75 to 80 per cent. of the water from cider in order to better preserve it, approves restoring the water when the cider is to be used, and sanctions the sale of the restored product as "cider" or "fresh cider."

Claimant manufactures pectin, but the pectin is manufactured as a *by-product of the vinegar,* and from a material which remains after the production of vinegar, which material was formerly wasted and lost.

The Agreed Statement of Facts rebuts conclusively the insinuation that claimant manufactures vinegar only from evaporated apples for the purpose of securing pectin.

Agreed Statement of Facts, Paragraph 1:

"* * * From the pulp of *unevaporated* apples and the pulp of the *evaporated* material it manufactures a product which it calls 'Pectin'."

The pulp remaining after the unevaporated apple is dejuiced is just as useful and valuable for manufacturing pectin as that from the evaporated apple.

"Pectins," as defined in the New International Encyclopedia, are

> "Substances of general distribution in *ripe fruits* and rather commin in *organs of flowering plants.* They probably originate from the pectose of the middle lamella of cell walls and are found in great abundance in fruits *during ripening.* * * * In boiled concentrated fruit juices they also coagulate probably independently of enzymes and along with sugars, organic acids and other substances constituting jellies."

"Pectose," "pectase," "pectine," "pectic acids," are defined in the Americana Encyclopedia as

> "A group of closely related substances found in the cell walls of certain *fruits and vegetables* during various stages of ripening, to which the power of forming a jelly is due."

Is the inference justified therefore that claimant's vinegar is a by-product or waste product incident to the manufacture of pectin from the pulp of evaporated apples or that pectin is procurable only from evaporated apples?

ARGUMENT.

Considering then, only the real issues developed from the actual facts, we have the simple question of whether a product manufactured by different methods shall be labelled to indicate the process. So long as the

purchaser is securing the product which he is interested in buying, of what consequence is the process of manufacture, provided it is sanitary, clean and pure, and does not alter the character or quality of the article?

Notwithstanding vinegar made from the juice of apples which have been evaporated is identical to that made from the juice of apples which have not been evaporated, the Government insists that because the process differs only through holding the apples in the one case in an evaporated state before pressing out the juice, the vinegars should bear distinctive labels. In support of its position, it quotes the definitions of "Cider" and "Vinegar" in Webster, the Encyclopedia Britannica, Nelson's Encyclopedia, The Farmers' Bulletin, and in the cases of *Eureka Vinegar Company vs. Gazette Printing Company*, 35 Fed. 570, *Monroe Cider Vinegar & Fruit Co. vs. Riordan*, 280 Fed. 624, 626, 627, and *Sterling Cider Co. vs. Casey*, 285 Fed. 885. To these may be added the definitions in Century, Standard, Murray, the Encyclopedias Americana and New International, in all of which appear only the words "expressed juice of apples." Nowhere, not even in the very standards prescribed by the Department itself, is the term "expressed juice of apples" limited to the expressed juice of "fresh" or "unevaporated" apples. For the Government to maintain its claim on the definitions alone, it must do so, not by standing on the definitions and standards, as written, but by qualifying them through the addition or reading in of the words "fresh" or "unevaporated" to qualify the word "Apples."

The case of *Smith vs. Rheinstrom*, 65 Fed. 984, is cited, as defining juice but an examination of the facts in that case, and a comparison with the instant case, readily shows its inapplicability.

In the *Rheinstrom* case the Tariff Act imposed a duty on cherry juice, a finished product. When eighty per cent. of the water was extracted from the juice, a gallon of the concentrated juice for revenue purposes had a greater value than a gallon of the juice in its original form. The concentrated juice differed in value, in alcoholic content, in specific gravity and color, and since the Tariff Act was one based on the value of the product and alcoholic content, necessarily the concentrated juice would carry a higher rate, and for *dutiable* purposes was a different article. To carry out the analogy, so far as the instant case is concerned, if the importer had restored water to the concentrated juice and added no alcohol, there would be no question but the article would have been admitted as cherry juice.

The *Rheinstrom* case was decided in 1895, and in November, of 1921, in the case of *Tower & Sons vs. United States*, Vol. 40, Treasury Decisions, T. D. No. 38,948, the United States Court of Customs Appeals, consisting of Presiding Judge Devries and Associate Judges Smith, Barber and Martin, considering with reference to cider instead of concentrated cherry juice the same tariff provision discussed in the *Rheinstrom* case, held that boiled cider, reduced to one-fifth in volume of the original, should be rated as "cider." Judge Martin, writing the opinion of the Court, says:

> "The importation consists of apple juice which has been boiled down to about one-fifth of its original volume, having now a consistency like thin maple syrup, containing no foreign ingredient and having suffered no chemical change whatever, except possibly a negligible alteration of its sugar content, such as is unavoidable in the operation. Its present consistency prevents its use as a beverage *but it may be restored to that use by simply*

adding water to it and that is one of the recognized and considerable uses of the importation in domestic trade. * * * It is obviously true that the appellants, by importing boiled cider rather than fresh cider, save in the cost of containers, in freight, cartage, storage, and, according to their claims, in the assessment of duties. But all of these facts were within legislative cognizance when the paragraph was enacted and when the term 'cider' was written into the provision without words of limitation it must be assumed that it was intended to include all kinds of cider, notwithstanding the fact that some might be reduced in volume by means of boiling."

Is not the language of the Court in the *Tower* case most applicable to the instant case? All of the definitions refer to the expressed juice of apples, and is it not fair and reasonable to say that the word "apples" in the definitions contemplates all kinds of apples,—fresh, evaporated, ripe, green, etc?

In the instant case, concentrated apple juice is merely a stage in the process of the manufacture of vinegar. The finished product is the juice of an apple fermented finally into vinegar and the acetic strength reduced through the addition of water.

So long then, as this juice is expressed or pressed from the apple, and that claimant presses out the juice is not questioned, nothing else is required, and since evaporation merely concentrates the juice and does not destroy it, claimant's vinegar complies with all definitions.

The Government, at Page 18 of its brief, says:

"The evaporated apples used by claimant retain twenty per cent. of the natural quantity of water. By subjecting them to high pressure a viscid exudation can be squeezed out of them. Can

such exudation be properly called the 'juice' of the apples? There is no difference between such a product and that procured by expressing the juice and reducing it eighty per cent. by boiling. In each instance eighty per cent. of the water content has been removed."

The Treasury Decision heretofore cited answers the query.

Again, at Page 20 of its brief, the Government states:

"No substance can be genuine apple juice other than that actually expressed from the apple. Such juice is composed of water and solids, one of which is sugar. If after the removal of the water squeezed from the apple and the substitution of other water, it remains apple juice, then the sugar might be removed and other sugar substituted, and it would still be apple juice. And thus, one by one, every ingredient might be removed and an equivalent substituted, and it would still remain apple juice, though not a drop or a particle of it had ever been inside an apple."

In 1914, the Department of Agriculture, in its Year Book, published an article by H. C. Gore, Chemist in Charge, Fruit and Vegetable Utilization Laboratory, Bureau of Chemistry, entitled "Apple Sirup and Concentrated Cider: New Products for utilizing Surplus and Cull Apples."

"Twenty-five per cent of the apples grown in American orchards never figure in the food supply of the nation, according to estimates of specialists who have been studying apple production. These waste apples are either good fruit for which the farmer can find no profitable market and therefore allows to rot under the trees, or surplus culls, left

undisposed of after all demands for vinegar and fresh cider have been met. Food conservationists who have long been studying the problem of reducing this waste are inclined to attribute the loss of good fruit, in some measure at least, to defects in existing marketing systems and the failure of orchardists to avail themselves fully of cold storage as a means of keeping fruit from the season of plenty to the season of scarcity and better prices. The problem, however, of turning the culls and the apples too small for retail sale into profit seems to call not for improved marketing conditions, but for the transformation of this material into new forms of food. * * *

The problem, therefore, was still unsolved when a series of apple crops larger than the average resulted in an even greater waste than usual and stimulated the Department of Agriculture to institute systematic studies into methods of treating apple juice. * * * After some experiments, the cider was frozen solid and the ordinary centrifugal machine long used in the sugar industry was employed as a convenient instrument to separate the sirupy portion of the cider from the water-ice by means of rapid whirling. This process, it was found, permitted the reduction of 5 gallons of cider to 1 gallon of cider concentrate, *which preserved all the original flavor of fresh cider and could be instantly restored to cider by the simple addition of the water that had been extracted.* This product, it was seen at once, was so reduced in volume and weight as to make shipments from apple orchards to the large cities profitable for much longer distances. Laboratory tests bore out the theory that in its concentrated form the cider would keep much longer than in its original condition and in cold storage would keep indefinitely. *The new product thus promises to make fresh cider available at soda fountains throughout the summer months.*" Pages 227-8-9.

Again, at Page 238, in speaking of the concentration of sweet cider by freezing, Mr. Gore says:

"During the apple-harvesting seasons of 1913 and 1914 the department experimented extensively on a commercial method of handling fresh cider so as to reduce its bulk to a point where longer shipment would be possible and also to secure a product that would keep better and could thus be sold over a longer period than is possible *with ordinary apple juice.*

Analyses show that ordinary cider contains from 12 to 14 per cent of solids, mostly sugars, which make up from 10 to 12 per cent, and malic acid. *The remainder of the cider is water, which experiment quickly showed can be withdrawn by freezing. Replacing the water so removed with ordinary drinking water will restore the cider to its original quality.*

After varied experiments it was found that 5 gallons of cider could be reduced by freezing and treatment to 1 gallon of sirupy cider concentrate. * * * When kept cool, as in a household refrigerator, concentrated cider, it was found, would not spoil for many weeks. When kept at or below 32° F. in cold storage it was found that concentrated cider could be kept from one season to the next and thus make *fresh cider* available as a beverage during the summer months. * * *"

Mr. Gore then gives diagrams, costs and the process in detail for freezing cider, and at Page 241 says:

"The fully concentrated cider will be a somewhat thick liquid with the cloudy appearance and color of unfiltered fresh cider. If kept sealed at household refrigerator or in cold-room temperatures, it will keep for weeks. Where allowed to become warm, it will gradually ferment, but will spoil much more slowly than ordinary cider. Concentrated cider intended for use during the following

spring or summer should be put into cold storage at once and kept at or below 32° F. It can be shipped anywhere in winter weather in unheated cars without danger of spoiling. It can be bottled, canned, or shipped in clean kegs. Inasmuch as 1 gallon can represents 5 gallons of cider and the equivalent of 250 gallons of fresh cider can be put in a 50-gallon barrel, the concentrated product can be shipped profitably for much longer distances to market than can the bulky fresh cider. In addition to saving 80 per cent on the freight, the reduction in volume permits the shipper to use containers one-fifth the size, which is an important saving in cooperage. The saving in containers, which have always been relatively expensive items in shipping cider, should alone nearly offset the cost of freezing and concentration. In addition there is the saving of drayage and other handling costs. *On its arrival at the market the retailer can at once restore it to cider by adding 4 parts of water, or he can sell it in the convenient concentrated form to his customers.* * * * In this way concentrated cider made in the fall can be kept over and used in the soft-drink trade during the hot months, at soda fountains, and in the home. * * *"

Page 244:

"A process which will make pure, *fresh cider* available as a summer drink at our soda fountains should open up a new and valuable market for the juice of surplus apples."

Science has discovered no test which indicates that anything more than water is removed from the apple through evaporation. The Department makes no distinction between fresh cider, so-called, and the dehydrated cider restored with water. What difference is there between restoring the water to cider than the water to the juice in the evaporated apple?

If the concentrated cider when the water is restored is real, genuine cider, can it reasonably be claimed the juice of the evaporated apple when the water is restored is imitation instead of genuine apple juice?

It is a matter of common knowledge that the Government advocates the evaporation and dehydration of fruits and vegetables, advertising, and insisting that evaporation and dehydration in no way detracts from the food value, the effect being merely the extraction of a percentage of the water and moisture therefrom. The fruits and vegetables can thus be better preserved; there is less rot, decay and deterioration; the space occupied is reduced, so that cheaper freight rates can be secured and shipments can be made in greater volume and with fewer cars; during the fruit and vegetable seasons the fruits and vegetables can be gathered to better advantage, and through being dehydrated, can be preserved more economically for future consumption.

The inconsistency of the Government in requiring a distinction in the labeling of vinegar made from evaporated and unevaporated apples is again manifest when we consider the regulation in regard to maple sugar, which is another instance identical with the vinegar situation.

The Department, in Circular 136, and its other circulars, in relation to maple sugar, defines it as follows:

> "Maple sugar, maple concrete, is the solid product resulting from the evaporation of maple sap or maple sirup."

Maple sirup is defined as,

> "Maple sirup is sirup made *by the evaporation of maple sap or by the solution of maple concrete,* and contains not more than thirty-five per cent (35%)

of water, and weighs not less than eleven (11) pounds to the gallon (231 cu. in.)."

Under that Circular, maple sirup made from maple concrete, as well as *maple sap,* is entitled to be labeled "Maple Sirup." The maple concrete may be said to be but a step in the process of manufacturing maple sirup. *What difference can there be between the process of maple sap to maple sirup and the juice of the evaporated apple to cider? Maple sirup may be made in one uninterrupted process, that is, from sap to sirup, or the intermediate stage may be invoked, of securing the sugar by evaporation, holding the sugar and later making the sirup.* We cannot conceive of a situation more comparable to the vinegar process.

The Government, in commenting on this regulation, at page 51 of its brief, seeks to avoid the parallel by claiming a difference between the words "juice" and "sirup." The similarity in the comparisons is not juice and sirup, but juice and sap and sirup and vinegar. It also answers that if the public knows that genuine maple sirup is made both ways and recognizes one *as good as the other,* that either can be branded "maple sirup."

By the agreed statement of facts it appears that for the past twenty years vinegar made from evaporated apples has been marketed and sold in large quantities, that it is as good as vinegar made from the juice of apples which have not been evaporated. Is there anything in the record to show that the public is unacquainted with these facts? Claimant is condemned for urging the very arguments the Government insists upon as justifying its sirup regulation.

The Government, at page 36 of its brief, cites the ruling of President, now Mr. Chief Justice Taft, with reference to the branding of whiskies.

Claimant is heartily in accord with this ruling. Claimant's vinegar is apple cider vinegar whether made from either kind of apples, and inasmuch as the public wants apple cider vinegar and is getting apple cider vinegar, there is no deceit. The public is concerned with the product rather than with the method of manufacture. As Mr. Chief Justice Taft said, in considering the different and improved processes for distilling whiskey, and the public's knowledge thereof:

> "If high wines at from 140° to 160° when reduced to potable strength and containing a very small quantity of fusel-oil and flavored by brown sugar are whiskey, as he has found, then the mere improvement in the process by continuous distillation, so as to give a product of from 160° to 188° proof and still further to reduce its fusel-oil, is not to change its whole nature, or to make what was genuine whiskey imitation whiskey, because of a slightly reduced trace of one ingredient. *The distinction is too impracticable in my judgment for the execution of the law. It may be that the public were not fully or exactly advised as to the change in process when it was made, but the change in the process was slight and affected economy in the production rather than the flavor of the product, and if the public detected no difference in the flavor in the product of the improved process, as they did not, but continued for forty years to regard it as the same, there was no deceit in continuing to call whiskey that which was thus merely improved in its manufacture without substantial change of composition of flavor.*"

Is not this exactly what claimant is insisting, and what the Circuit Court of Appeals below held in the instant case?

> "The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated

> by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant." *Rec. p. 31.*

The Government's reference to spirits made from molasses (page 37 of its brief), is entirely beside the instant case. Whiskeys are made from grains and rum from molasses. The primary substance in each case is different. They, therefore, require different brands in the absence of having acquired a common trade name. Apple juice is apple juice, whether from evaporated or unevaporated apples, and there is, consequently, no aptness in the analogy which the Government there seeks to draw.

Under Sections 3 and 4 of the Food and Drugs Act, the enforcement thereof is entrusted to the Secretaries of Agriculture, the Treasury and Commerce and Labor, jointly, and the extent of the authority of the officers charged with the administration of the Act is clearly defined and closely limited. The rules and regulations promulgated by the three Secretaries are limited, and the validity of any of them may be challenged by the parties interested in the proceeding. They represent, in other words, the opinion only of the Department in regard to adulteration and misbranding.

On February 27, 1912, Food Inspection Decision No. 140 was issued by the Board of Food and Drug Inspection, and is the first attempt on the part of the Department to give vinegar made from apples which have been evaporated a separate classification. It is under this F. I. D. that the Government now charges misbranding.

> "1. *Vinegar, cider vinegar, apple vinegar,* is the product made from the alcoholic and subsequent acetous fermentations of the *expressed juice of apples.*

2. *Wine vinegar, grape vinegar,* * * *

3. *Malt vinegar,* * * *

4. *Sugar vinegar,* * * *

5. *Glucose vinegar,* * * *

6. *Spirit vinegar, distilled vinegar, grain vinegar.* * * *

Several questions regarding these definitions have been raised and after investigation the board has reached the following conclusions:

Meaning of the term 'vinegar.'—While the term 'vinegar' in its etymological significance suggests only sour wine, it has come to have a broader significance in English-speaking countries. In the United States it has lost entirely its original meaning and when used without a qualifying word designates only the product secured by the *alcoholic and subsequent acetous fermentation of apple juice.*

'Second pressings.' It is held that the number of pressings used in preparing the juice is immaterial so long as the pomace is fresh and not decomposed. The practice of allowing the pomace from the presses to stand in piles or in vats for a number of days, during which time it becomes heated and decomposed, and then pressing, securing what is ordinarily called 'second pressing', in the opinion of the board produces a product which consists in whole or in part of a filthy and decomposed material and is therefore adulterated.

Vinegar from dried-apple products.—The product made from dried-apple skins, cores, and chops, by the process of soaking, with subsequent alcoholic and acetous fermentations of the solution thus obtained, is not entitled to be called vinegar without further designation, but must be plainly marked to show the material from which it is produced. The dried stock from which this product is prepared must be clean and made from sound material. * * *

Acid strength.—All of the products described above should contain not less than four (4) grams of acetic acid per one hundred (100) cubic centimeters." *Food Inspection Decision, No. 140.*

This F. I. D., while appearing to approve the definition of "apple vinegar" as given in Circular No. 19, which was in effect at the time the Pure Food and Drugs Act was passed, varies that definition and defines it as being the product made "from" instead of "by" the alcoholic and subsequent acetous fermentations of the "EXPRESSED juice of apples," instead of "the juice of apples."

The definition in F. I. D. 140 does not change Circular 19, which was in effect at the time of the publication of this F. I. D. While it may represent the interpretation which the Board of Food and Drug Inspection placed upon the standard prescribed by Circular 19, it is not, nor has it become a standard, and at the time of its issuance did not alter, but merely attempted to interpret, the standard prescribed by Circular 19.

Circular No. 136, which was properly promulgated and adopted May 14, 1919, *seven years after* F. I. D. 140 was issued, entirely ignores the interpretation placed on the definition in Circular 19 by F. I. D. 140, and defines cider vinegar as being made from the "juice of apples," and not the "expressed juice of apples," *and creates no separate class for vinegar from dried apple products,* This would indicate that the Secretaries in re-adopting and approving the Standard in Circular 19, by ignoring the interpretation placed thereon by F. I. D. 140, did not intend that this F. I. D. should be further considered. Had it been otherwise, the standard prescribed by Circular 136 would have been in the words, and as indicated by F. I. D. 140. It is evident, therefore, that the definitions and standards, shown in F. I. D. 140, have been

superseded and are overruled and disregarded by Circular 136.

The term "apple," as used in the Department's standards, is not qualified or limited by such words as "fresh" or "unevaporated." It is intended as a generic or class term only, signifying the primary source from which the substance must come out of which the vinegar is made, in order to justify the use of the term "apple cider vinegar." As such, it would include all kinds of apples, ripe, green, storage, fresh or evaporated. The definitions for "cider" and "vinegar" regard apples only as the primary source from which the juice of apples is to be obtained, and it is from this juice, through alcoholic and subsequent acetous fermentation, that cider and vinegar is secured. The clear meaning and only requirement of the regulations and definitions is that apple cider vinegar shall be an apple derivative. Certainly an apple which is in an evaporated state is none the less an apple.

Evaporation removes about seventy-five per cent. of the water in the apple, the remaining twenty-five per cent. carrying in solution all of the soluble parts of the apple, is none the less juice by reason of that fact. It is simply a richer, more sirupy juice, but is nevertheless juice.

The Allen patent for a dry mince pie compound recognizes that cider or juice remains in the apple after evaporation. In *Dougherty vs. Doyle*, 63 Fed. 475, involving the Allen patent, it appears that the water was evaporated from the apple for the purpose, as stated by the patentee,

> "so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it."

The elimination of part of the water of the apple in the manufacture of vinegar is immaterial. Vinegar produced from unevaporated apples is always reduced by the addition of water. The content of acetic acid is so great that, unless reduced, the vinegar would not be a condiment, and the regulations for the labeling of vinegar provide for stating the per cent. to which the vinegar is reduced by the addition of water.

Any argument, therefore, on the part of the Government which seeks to claim that the water in the apple is restricted to native water becomes immaterial, for what difference is there whether, in securing the necessary acid content for the vinegar, water is added early or late in the process of manufacture? It is a well known fact that, in the manufacture of cider or vinegar from apples, fifty per cent. in water of the weight of the pomace resulting from the first and subsequent pressings is added to it before the second and subsequent pressings are made. The New York case (which we will later quote in detail) comments on the general practice of second pressings of the pulp of unevaporated apples after adding water. Second pressings are also sanctioned by F. I. D. 140, as heretofore noted.

The regulations permitting second pressings without a distinguishing label, and compelling a distinguishing label when apples which have been evaporated are used, is another illustration of the inconsistency in the Department's regulations. What possible difference is there in theory or in principle, between the addition of water to the pomace after the first pressing and replacing the water in evaporated apples?

The New York State Courts, within the past year, have passed on the precise question involved in the case at bar, namely, whether vinegar made from apples that

have been evaporated is apple cider vinegar made exclusively from the pressed juice of apples. (In view of the importance of this case, and its bearing on the present controversy, we shall quote in detail the opinions of the different Courts during the various stages of the case.)

The evidence in that case is most complete in that samples from the juice of apples that have been evaporated and of apples that have not, as well as samples of the juice of both kinds of chops, cores and skins, were submitted, together with samples of the ciders and vinegars from each. A comparative analysis of all of the samples was in evidence and claimant's process of *pressing* out the juice was explained and described to the most minute detail.

The trial Court, at the conclusion of all the testimony, directed the jury to return a verdict for the State, Mr. Justice Thompson delivering the opinion:

> "I am unable to conform my mind to the views of counsel. I feel that the statute was designed to secure to the consumer under this rule that the legislature has made, the delivery of vinegar derived solely from the juice of the fresh fruit, when he shall purchase the vinegar, and I feel that that is the attitude of the court and spirit of the law at this time, in the light of the more modern Sales Act or Personal Property Law that we have in all States, and the pure food laws and farm and market laws, and the fact that the producer and consumer are so much more remote from each other in these times than they were in years past. I feel that in view of these things the law requires under these conditions, and the tendency of judicial action is, that these laws must be strictly construed and strictly interpreted and enforced. So my ruling in this case may be stated and made a part of the record to the effect, that I grant this motion upon the as-

sumption that this statute prohibits the sale of cider made from evaporated fruits, under this sort of branding, at least, and that it only authorizes under this branding, or this marking, the sale of vinegar made from the natural fruit without the intervention of the process of evaporation."

The Douglas Packing Company moved for a new trial upon exceptions taken at the trial, and upon its application the trial Court ordered the motion for a new trial to be heard in the first instance in the appellate division. The appellate division of the Supreme Court affirmed the decision without opinion. Mr. Justice Clark, however, filed a dissenting opinion:

"The primary purpose of the statute (Sec. 72 of the Agricultural Law, now Sec. 209 of the Farms & Markets Law), requiring that containers of vinegar should be branded as prescribed in the statute, and that no person should mark or brand as or for cider or apple vinegar any package containing that which is not cider or apple vinegar, was to insure to the public an article that was pure, to the end that the health of citizens would be safeguarded.

There was no evidence in this case that the product of defendant-appellant was not of the finest quality and absolutely pure. The juice of the apple was obtained by pressing, and I cannot see what possible difference it made whether the pressing was by pressure applied from above or below.

Defendant's vinegar was made from the juice of apples, evaporated of course, but from apples just the same, and the "acidity, solids, and ash" of both "have been derived exclusively from the apples from which they were fermented."

The vinegar in question was made exclusively from the pressed juice of apples. It was not pressed in the old fashioned way perhaps, where rotten, wormy, and dirty apples and skins and cores were ground up together and the juice pressed out, and vinegar made from it, but it was made from the pressed juice of evaporated apples which retained all the juice of the apple and from which only a portion of the water had been removed by evaporation.

The primary source from which this vinegar came was apples. The product was in no way adulterated. It was conceded on the argument by the learned attorney general that defendant's product was pure. By the process of evaporation water had been removed from slices of selected apples by evaporation, and before the product in question had been obtained nothing but water had been added.

It was not river water as was the fact in the case of *People vs. Niagara Fruit Co.*, 75 A. D. 11, on which respondent relies. I do not think that case is a controlling authority here. The juice from which the vinegar was made in that case was extracted from apple cores, skins, and small pieces of apples which had been evaporated, and then the evaporated article had been soaked in river water, and coloring matter had been added to make the product look like cider vinegar. It was of course impure.

Here the product was concededly pure and the only fault the respondent can find is that the packages in which it was shipped were not properly branded. In other words, respondent claims it should have been plainly stated on the containers that the vinegar was made from evaporated apples.

Respondent is seeking to enforce a statute that is highly penal in its nature, and it should not be construed against the citizen and in favor of the state.

People v. Briggs, 193 N. Y. 459

People v. Braested, 30 A. D. 401

The cider from which this vinegar was made coming exclusively from the juice of apples pressed or forced out as described by the witnesses and carried in solution in the native water of the apple and without the addition of anything but pure water, and the vinegar being absolutely pure, I do not think the statute was violated.

People v. Heins Co., 90 A. D. 408

To outlaw defendant's fine product made from apples exclusively with no adulteration, and with nothing added except pure water, and for no reason except that the containers were not branded with the statement that the product was made from evaporated apples, strikes me as going too far in construing a penal statute in favor of the state.

If defendant's product had been adulterated in any way, or was in the slightest degree impure, or if it contained any deleterious ingredients, a different situation would present itself, but where the product was pure, as in this case, and contained no ingredients that would in any way injure the public health, I do not think the spirit of the statute was violated by failing to have branded on the containers the statement that the vinegar was made from evaporated apples.

I therefore dissent and vote to reverse the judgment and dismiss the complaint."

The case was then taken to the Court of Appeals and the lower courts were reversed, Judge Pound dissenting, but writing no opinion. (Syllabus):

> "Under the Agricultural Law (Cons. Laws, ch. 1, § § 70, 71, 72, amd. L. 1916, ch. 125), properly construed, vinegar made from evaported apples, by treating them with a certain percentage of water squeezed out again as apple juice, is 'apple cider vinegar' within the meaning of the statute, and, therefore, defendant, who had made vinegar in this way and offered it for sale branded as 'apple cider vinegar,' is not liable under the statute for improperly branding vinegar. (*People v. Niagara Fruit Co.*, 75 App. Div. 11; affd., 173 N. Y. 629, distinguished.)"

"CRANE, J.

This is an appeal from a judgment recovered in the Supreme Court for a penalty of $50.00 and costs in favor of the plaintiff and against the defendant, based upon a finding that the defendant had improperly branded vinegar in violation of the Agricultural Law. Sections 70, 71 and 72 of the Agricultural Law * * * read as follows:

> '70. Definition of vinegars and adulterated vinegars.—All vinegars made by fermentation without distillation must carry in solution the extractive matter derived exclusively from the substance from which they were fermented. The terms "cider vinegar," "apple vinegar" shall be construed to mean the product made exclusively from the pressed juice of apples by alcoholic and subsequent acetous fermentations, the acidity, solids and ash of which have been derived exclusively the apples from which it was fermented. * * * '"

The case against the defendant is based upon a concession reading as follows:

> "It is admitttd that on or about September 1920, for a valuable consideration, the Douglas Packing Company sold and delivered to one William H. Dunne, a domestic corporation dealing in groceries, in Norwich, New York, eighty barrels of vinegar, a part of which eighty barrels was manufactured from apples purchased by the Douglas Packing Company in Vermont and Massachusetts and then made into the evaporated, unpared apples designated as 'chops'; and that the sample in question was a part of such consignment."

The question presented is whether vinegar made from evaporated apples is apple vinegar made exclusively from the pressed juice of apples. If it is, the defendant has not violated the law in branding his product as apple cider vinegar.

There is no doubt, in this case, about the vinegar being the sole product of apple juice. Neither is there any claim that the defendant's product has been adulterated or discolored. The People have frankly admitted that this case is not one of adulteration, but one of misbranding. The name or brand "cider vinegar" or "apple vinegar" is said to indicate a process as well as a product, and that these terms signify to the public that fresh apples and not dried or evaporated apples had been used. The People also insist that the words of the statute "made exclusively from pressed juice of apples" mean juice pressed out of apples, no matter how old or in what condition, as they are taken from the tree or ground.

We cannot read this statute as having this narrow limitation. The process adopted by the defendant, in a word, is this: The apples have the water taken out of

them by evaporation. In this way they are preserved from rotting. Later they are put in a big vat or tank, water is poured upon them, they are submitted to pressure, and the water comes out at the bottom of the tank in the form of apple juice. The water which was taken out by evaporation is put back in by this process and squeezed out again as apple juice. It is conceded that the product, by this process, is of the same quality as the juice extracted under pressure from the fresh apple. I need not stop to enter into an analysis given by the witnesses of this apple juice. It is sufficient to say that the apple juice taken from the dried apple is as good as the apple juice taken from the fresh apple, and that it contains no other properties than those found in the apple originally. The point of this case seems to turn on whether or not apple vinegar and apple cider vinegar indicate to the purchaser a particular process of manufacture. The old way of getting the juice from the apple and making cider or apple cider vinegar was simply to squeeze out the juice from the apple. There is nothing in any law which says what kind of apples these shall be. The people claim, as long as the substance be an apple, no matter what its condition, if it be subject to pressure and juice extraction, the product is that *only* which is known as apple cider or, after fermentation, apple cider vinegar.

The defendant's process, as given by the witnesses is as follows: The chops or apples are carried by automatic conveyors up to a platform; the platform is level with the top of certain receptacles, which are in the nature of tanks or vats, heavy planking being used for the sides of the vats and the bottom and heavy iron bands about it, unusually heavy. When the receptacle has been filled two-thirds or thereabouts full, a quantity of water

is added. Immediately after a grating of heavy pieces of wood is put on top of the apples on which a heavy weight is placed. The apples swell when they have reached a certain relation to the top of the tank and while that swelling is still going on a vent in the bottom of the tank is opened and a force of water is applied through a pipe which is inserted from above and when out of that vent in the bottom there has passed the same quantity of liquid that was in those apples in their fresh state, the force of the water at the top automatically shuts off; the vent at the bottom shuts off; and the juice from those apples has then entirely passed out, leaving nothing but water in the apples.

The method which the people insist upon is to grind the apples into fine particles, place the pulp in cloths, which in turn are placed upon an immovable flat surface underneath a movable surface driven by hydraulic power applied indirectly by means of a screw against the pulp in the cloth in such a manner as to squeeze out the apple juice therefrom. In the ordinary cider and vinegar factory this pomace from the first pressing is then picked apart or broken up and placed in a receptacle. To it then is added substantially one-half of its weight in water. The mass is then permitted to soak for from four to twelve hours, according to the weather, to diffuse the extract out. A second pressing is then taken. The resultant liquid from the first and second pressing being mixed and sold by such manufacturer as apple cider and the vinegar made therefrom as apple cider vinegar.

The juice obtained from the fresh and from the evaporated fruit is treated alike. The chemical transformation and the process and methods of manufacture into apple cider vinegar are identical. To this there is one exception. To prevent discoloration and arrest de-

composition the chopped apples in the process of evaporation are subject to a bath in sulphur fumes whereby the evaporated apple carries an entirely harmless quantity of sulphur dioxide beyond that contained naturally in the apple. To remove this additional sulphur dioxide content, the defendant utilizes barium carbonate before fining and filtration and thus eliminates the excess sulphur.

In view of the concession made by the counsel for the People that this sulphur and the chemical agent to remove it in no way adulterate the vinegar or change its substance or quality, and that there is in the vinegar product manufactured by the defendant no foreign substance, this element adds nothing to the People's case. As stated before it is simply one of branding, not of adulteration.

As said before we cannot read the statute of this state, which is above quoted, as giving the meaning to the words "cider vinegar," or "apple vinegar," and "pressed juice of apples," as indicating any particular kind of apples from which the juice is to be pressed. Provided the substance pressed be apples, the product apple juice, and the method of extraction pressure, the law is complied with. This product, when further treated, as required by law, becomes apple vinegar, or apple cider vinegar, and may be so termed. The law does not say or indicate how the pressure shall be applied. When a penalty is to be imposed or a manufacturer is subject to prosecution, it is reasonable to expect that the statute which he is claimed to have violated shall be clear, distinct, understandable and not subject to hidden meaning.

If the Legislature had intended in section 70 that the juice should be pressed from a particular kind of apple, or an apple in a particular condition, it would

have been a very simple matter to have said "fresh apples" or "not evaporated apples." The process of making vinegar from evaporated apples has been going on for a long time, and must have been known to the persons interested in drafting the Agricultural Law. When, therefore, the Legislature made no distinction in the kind of apples to be pressed, it is not for the courts to do it. Neither is it for the courts to try and figure out what the Legislature intended or might have intended or should have intended when the intention is not apparent upon the face of the statute. We find no intention to exclude evaporated apples from section 70.

That the Legislature had a broader purpose in mind is indicated when we read the entire section.

Section 70 is an attempt to define vinegar and adulterated vinegars. It says vinegars made by fermentation must be derived exclusively from the substance from which they were fermented. Cider Vinegar or apple vinegar is the product exclusively from the juice pressed out of apples, sugar vinegar is the product made from sugar, malt vinegar from barley malt, wine vinegar from the juice of grapes, glucose vinegar from corn sugar or glucose, distilled vinegar or grain vinegar from diluted, distilled alcohol. It is quite clear that the import of this statute is to require that when a thing is termed cider vinegar or apple vinegar that it shall be made exclusively from apples or from the juice pressed out of apples. The defendant's product meets this requirement; it is made exclusively from the juice pressed out of apples. The fact that the apples may have been dried apples or evaporated apples or green apples or old apples makes no difference so far as this law enacts.

This vinegar of the defendant and the label under which it was sold, it is conceded, complied with all the

other requirements of the law. As heretofore stated, the only complaint made is in the use of the label words "apple cider vinegar." The case of *People vs. Niagara Fruit Company* (75 App. Div. 11, 12; affm'd 123 N. Y. 629) is not in point as in that case coloring matter had been added to the vinegar making an illegal adulteration. It is said by Judge Spring in his opinion "the chemical analysis showed that each sample of vinegar was below the standard fixed by the Legislature of the State of New York, in that it contained less than the required quantity of acetic acid and that it was not the exclusive product of pure apple juice, and that it contained artificial coloring matter which caused a distinct change in appearance.

We are dealing with the interpretation of our statute in the light of the evidence before us, and for the reasons here stated the judgment of the Appellate Division and the Trial Term should be reversed and the complaint dismissed, with costs in all courts."

People vs. Douglas Packing Co., 236 N. Y. 1 (Advance Sheets June 16, 1923) 139 N. E. 759.

Should your Honors desire we shall be glad to furnish copies of the transcript of the record in the New York case.

The New York case is identical with the instant case. The evidence, while introduced in detail, conforms exactly to the agreed statement of facts in the present case. The label was the same. The New York laws regarding the labeling of vinegar are more drastic, if anything, than the Government standards, and the reasons advanced by the State in that case are the same

as the Government is urging in the case at bar. The decision holding that claimant's product was not misbranded is in entire accord with the opinion of the United States Circuit Court below.

The definitions of vinegar cited by the Government from the Statutes and regulations of the various states are not in conflict with the definitions under the Federal laws. The Government regulations and the various State statutes, permit the reduction of vinegar by the addition of water, and any claim, therefore, on the part of the Government, that the water added to the vinegar by claimant is a foreign substance, fails. Necessarily a State which has a regulation such as Massachusetts appears to have, limiting the juice to that from fresh apples, if permitting the reduction by the addition of water, is entirely without force, for the water may be added to the juice before fermenting, without affecting the fermentation, or the finished vinegar may in turn be diluted. So long as the proper acetic strength is shown on the label, there is no misbranding.

The case of *Commonwealth vs. Burtnett,* 58 P. Sup'r Crt. 604—cited by the Government at page 27, applied to vinegar made from unevaporated apples and held that the reduction of such vinegar by the addition of pure water constituted *adulteration.* The Pennsylvania law was subsequently amended—so the case is without point.

We are agreed with counsel for the Government that the primary object of the Pure Food and Drugs Act is to protect the public health and prevent deception. That this is the fact requires no comment, since the Courts, in interpreting the Act, uniformly declare this purpose.

In *United States of America vs. Antikamnia Chemical Co.*, 231 U. S. 654, it is stated that the purpose of the Act is

> "to secure a purity of food and drugs, and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it."

In *United States of America vs. Lexington Mill & Elevator Co.*, 232 U. S. 399:

> "The primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food."

To the same effect:—*United States vs. Coca Cola Co.*, 241 U. S. 265.

United States vs. Schider, 246 U. S. 519, 522.

> "We have heretofore said: 'The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.' *United States v. Antikamnia Co.*, 231 U. S. 654, 665. 'The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.' *United States v. Lexington Mill & Elevator Co.*, 232 U. S. 399, 409. And see *United States v. Coca Cola Co.*, 241 U. S. 265, 277."

That the Courts, in construing brands or labels, give to words their ordinary and customary meaning, is not disputed, and again we agree with the Government.

U. S. vs. 150 Cases of Fruit Puddine, 211 Fed. 360;
U. S. vs. 75 Boxes of Alleged Pepper, 198 Fed. 934;
U. S. vs. 30 Cases Grenadine Sirup, 199 Fed. 932;
Von Bremen vs. U. S., 192 Fed. 904.

The Courts, in interpreting the Act, will keep constantly in mind the legislative intent, the evil sought to be overcome, and, if possible, give substantial force and effect to that intent.

As was said in *U. S. vs. 650 Cases of Tomato Catsup,* 166 Fed. 773, 775, which was a case involving an alleged misbranding of tomato catsup—

> "It is especially necessary in administering an act like the Pure Food Law, however beneficial it may be, that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is within the intent of Congress and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions."

And the Courts will see that the officers of the Department in enforcing the Act, do likewise.

In re Wilson, syrup, 10 per cent. of which is made from maple sugar and 90 per cent. from white sugar, put up in bottles, having thereon labels, containing the name "Gold Leaf Syrup," with a trademark consisting of a gold leaf in the form of a maple leaf and stalks of sugar cane, and the words "Composed of Maple and White Sugar" in plain letters, was held not to be misbranded. In commenting on these facts, the Court said:

> "From examination of former cases dealing with the subject of misleading representations on labels, I am impressed with the great value of the

legislation known as the Pure Food Act * * * but I am further impressed with the fact that an attempt to apply that act to cases of this character cannot but serve to bring that act into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor."

In re Wilson, 168 Fed. 566, 568.

"Save by the declaration in the statute as to what a label shall contain, no standards are prescribed for brands or labels or the minuteness or particularity in which they must indulge in describing an article of food. The statute should be liberally construed to effect its beneficent purposes, but no rule of construction permits us to so construe its language that the statute shall operate as a snare or trap to the honest manufacturer or producer who brands or labels his products, in descriptive words or devices which fairly inform the purchaser of the nature and ingredients of the product offered for sale and are not so framed as to deceive or mislead the ordinary purchaser."

United States vs. One Carload of Corno Horse & Mule Feed, 188 Fed. 453, 457.

The definitions, as we have before pointed out, are all alike. Various names are given to vinegars to distinguish the different kinds, one from the other. Vinegar from malted grain is "malt" vinegar; vinegar from alcohol and water, "spirit" vinegar; vinegar from fermented cane sugar solution is "sugar" vinegar, and vinegar made from apples, *derived by any* known process is "apple vinegar" "apple cider vinegar." Since such vinegar cannot be made from apples until the sugar content has been transformed into alcohol by fermentation, the intermediate product becoming hard cider and

the resulting product vinegar, this vinegar is and has always been called "apple cider vinegar" and the terms "apple vinegar" and "cider vinegar" are and always have been synonymous.

In view of the facts in this case, is the Department justified in the arbitrary position which it assumes in saying that *no* vinegar except that made from the juice of apples which have not been evaporated may be labeled "apple cider vinegar," or even "apple vinegar" as is sought to be done in this case, and as is shown by the last communication released by the Department of Agriculture relating to the labeling of vinegar made from apples which have been evaporated.

"U. S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Press Service.

Release—Immediate.

THE LABELING OF VINEGAR MADE FROM EVAPORATED APPLES.

Washington, D. C., February 20, 1922. On September 12, 1921, after consideration of conditions existing at that time the Department of Agriculture announced that no seizures would be made of shipments interstate of vinegar made from evaporated apple material if labeled 'Apple Vinegar,' pending a decision by the courts of cases already instituted on the shipment and sale of this product labeled as 'Apple Cider Vinegar.' Since that announcement the court has held that vinegar made from evaporated apple products is misbranded if labeled as 'Cider Vinegar' or 'Apple Cider Vinegar.' It is the opinion of the department, after carefu. consideration of the entire question, that the term 'Apple Vinegar' is very generally understood by the consuming public to

mean a product made by alcoholic and subsequent acetous fermentations of the juice of fresh apples, and is therefore regarded as synonymous with the term 'Cider Vinegar' and 'Apple Cider Vinegar.' A vinegar made from evaporated apples or evaporated apple products will therefore be considered misbranded if labeled as 'Apple Vinegar' without further qualification. Such a product if properly made is a pure and wholesome article of food, but it should be sold under a label clearly distinguishing it from the product made from the juice of fresh apples, such, for example, as 'EVAPORATED APPLE VINEGAR.' The decision temporarily permitting the use of the unqualified term 'Apple Vinegar' on a product made from evaporated apples or evaporated apple products, published September 12, 1921, is hereby revoked.

20-22-2 609-22."

Surely, claimant and other manufacturers who are honestly and in good faith producing a pure, wholesome product, which, under a fair, reasonable, everyday, common sense reading and interpretation of the definitions in the dictionaries and the standards prescribed by the Government, is properly labeled, are entitled to be and should be protected against the unwarranted ruling which the Government officials are now seeking to enforce.

We find no reported cases involving the question of the labeling of fruits that have been evaporated, or their juices, except those we have previously commented upon, yet evaporation, as applied to fruits, has been in common use since long prior to the time of the Food and Drugs Act.

The Government, in support of its claim that claimant's label is deceptive, quotes from a large number of cases having to do with misbranding. All these cases

deal with facts where adulteration and misbranding have been sustained because of the use of a substitute for some necessary ingredient, the addition of a coloring matter to produce an appearance similar to the genuine article, the misleading marking of an article blended or compounded from different articles, or involving the addition of a substance which will produce an effect or a taste similar to a recognized brand or compound; the use of unwholesome or impure ingredients, and the marking of an article falsely as to the state, territory or locality from which it is produced or in which it is grown.

In *Weeks vs. U. S.*, 245 U. S. 618, an article branded "special lemon, lemon turpine and citral," was held to be misbranded because it was offered for sale as lemon oil, when in fact it was made from alcohol and citral derived from lemon grass.

In *United States vs. Schider*, 246 U. S. 519, the article was labeled "Compound Ess Grape," but contained nothing from grapes.

United States vs. 10 Barrels of Vinegar, 186 Fed. 399, involved *a blend or mixture of distilled vinegar* to which a small quantity of pure *boiled apple cider vinegar* had been added for coloring, the product being described as "Saratoga Brand Vinegar, a blend of a pure boiled apple cider and distilled vinegar." It is well known that cider vinegar is superior to distilled vinegar, and the Court held the punctuation and general form of that label was misleading to the extent that the public did not understand that the vinegar was *a blended article*, and the forfeiture was sustained.

Libbey, McNeil & Libbey vs. United States, 210 Fed. 148, had to do with the labeling of condensed milk, con-

taining 42 per cent. of cane sugar, and since condensed milk, as known to the trade, did not contemplate sugar, it was condemned as misbranded.

United States vs. 150 Cases of Fruit Puddine, 211 Fed. 360. The product known as "fruit puddine" and labeled "Fruit Flavored Puddine" was misbranded because no fruit was used in the product.

United States vs. 2 Cases of Chloro-Naptholeum Disinfectant, 217 Fed. 477. A disinfectant labeled "Chloro-Naptholeum" not containing an essential ingredient either chlorine or chloro-napthol, was therefore held misbranded.

In *Prince Mfg. Co. vs. Princess Metallic Paint Co.*, 135 N. Y. 24, the paint involved did not contain ore mined from the tract belonging to Prince, and the use of that trademark was therefore enjoined.

In *Warden vs. California Fig Syrup Co.*, 187 U. S. 516, the use of a label "Fig Syrup" or "Syrup of Figs" was a misbranding because the product contained practically no syrup or extract of figs in compound and its medicinal quality was due to the senna which it contained.

Royal Baking Powder Co. vs. Emerson, 270 Fed. 429, was a case where baking powder, manufactured under a certain formula, had been marketed for a number of years and the formula was advertised as having particular merit. Later the manufacturer substituted phosphate for cream of tarter or tartaric acid. The public, through this manufacturer's campaign of advertising, had, *prior to the substitution*, been particularly educated to the fact that the substituted ingredients were not healthful or as good as the original ingredients, and, therefore, when the changed article was sought to

be sold under a label which led the purchaser to believe that he was buying the former article, there was a misbranding.

An analogy is sought in the case of oleomargarine, but as the ingredients in oleomargarine differ from those in butter, the case is not parallel.

None of these situations are analogous to the instant case, and the language of the Court, in condemning the labels and products therein involved, would not apply to claimant's product.

The instant case stands upon its own facts, and involves neither substitution, imitation, inferior products, or any of the other grounds considered in the cited cases. The Government's principal argument for misbranding is that the consumer is deceived, that claimant's label "exhales deceit," not because an inferior product is marketed, not because the product is different in any single respect that the Government is able to point out, not because the product is not apple cider vinegar, but because it is manufactured in a manner different than the Government claims it is popularly supposed to be produced. That such a conclusion is unjustified is apparent from the facts and was one of the grounds for reversing the District Court.

> "The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad oil cases. The very branding which the court, in *Brina v. U. S.*, 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later, was shown

to the same court in *Von Bremen v. U. S.*, 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court can not judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant." Rec. pp. 33-34.

The Government intimates that unless its distinction in the labeling of vinegars is enforced, unfair competition among the producers of different types of vinegar is promoted. The question intimated is entirely outside the purpose and scope of the Pure Food and Drugs Act and is not in any way an issue in this case, but granting for argument that it is an issue and that there is cause to consider it, the facts are contrary to such a conclusion.

The process of manufacturing vinegar from the juice of apples that have been evaporated is not a new process, but is one that has been in general use among manufacturers since prior to the Pure Food and Drugs Act, and vinegar so produced has for years been sold under the label "Cider Vinegar." Apples to be evaporated must be apples that are sound and free from rot and the vinegar manufactured from such apples must, therefore, be of a better grade than vinegar manufactured from the ordinary run of cider apples. The further fact that the preserving of apples for vinegar purposes by evaporation will help to conserve the apple crop and so tend to prevent a cornering of the vinegar market, through securing control of the fresh apple

crop, indicates that rather than promoting unfair competition among the vinegar manufacturers it operates as a preventive and assures the public of a uniform vinegar manufactured throughout the year. An appalling waste in the apple crop is avoided and an industry which would be confined to manufacture during a short period of time is permitted to employ its labor and capital over the entire period of the year.

Considering the facts in this case impartially, can it be fairly claimed that claimant's vinegar is anything else than apple cider vinegar? Evaporation, according to any known scientific test, removes no constituent part of the apple other than water. Yet the Government insists there may possibly be a difference in the vinegars and demands a label that indicates a difference.

What possible benefit can result to anyone from a label that suggests a fancied difference where none in fact exists? Why discriminate against vinegars? An apple pie is an apple pie whether made from apples which have been evaporated or apples which have not. The same is true of peach or apricot pie. Maple syrup, whether made from maple sap or maple concrete, is maple syrup. Cider reduced by freezing or by boiling, and to which the water frozen out or boiled out is later restored, is still cider.

Cider is frozen or boiled to eliminate part of the water in order to reduce its bulk and thus facilitate preserving and storing, and maple sap is converted to maple concrete for the same purpose. So in the case of claimant's vinegar, the water is partially removed from the apple to prevent the waste and deterioration incident to handling and storing of raw apples or the juice thereof. Is this apple juice, remaining after reduction

by eliminating part of the water, to be condemned because stored and preserved in the cellular tissue and portion of the apple itself rather than in some other appropriate container?

> "The conservation of our food product is of some concern to the public and perhaps second in importance only to the demand for pure and unadulterated food. * * * Therefore, an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without changing the product it should be encouraged rather than condemned." Record, p. 32, Opinion C. C. A.

The Food and Drugs Act deals with substantial and not fanciful things. Neither the letter nor the intent of the law as to misbranding justifies a distinction between vinegar made from apples by a continuous process and vinegar made by the same process slightly interrupted, when the product is the same. When a purchaser is securing an article branded for what it is, there is no deception. Claimant's product is not an imitation, and is not offered for sale under the distinctive name of another article. The label is not misleading, and contains no statement regarding the ingredients which is misleading in any particular, inasmuch as the vinegar is genuine apple cider vinegar, and the apples from which it is made are selected in the first instance for their freedom from rot and ferment, and for their soundness and maturity. The labeling which the Department is insisting on in this case is arbitrary and unwarranted and of no benefit to the public.

> "It must also be assumed that legislation upon any subject has some definite and substantial object in view and is not in furtherance of technical

purposes or barren idealities. It was declared by the Supreme Court of the *United States against Lexington Mill and Elevator Company,* 232 U. S. 399, that the primary purpose of Congress in enacting the Food and Drug Act of 1906 was to prevent injury to the public health in the sale and transportation of interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process called 'Alsop Process,' and while the charge there was adulteration by adding to articles of food consumption poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn a food product upon the ground that it is adulterated, it is encumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public *and not merely for the purpose of exercising arbitrary control of a private business.''* R. pp. 32-33, Opinion C. C. A.

The judgment of the Circuit Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

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